96-25

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

THEODORE EDMONDS,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the failure to properly instruct a jury regarding the requirement of unanimity as to an element an offense prevents the jury's decision on that offense from being a "verdict" within the rule of *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), so as to render harmless error analysis inappropriate.

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CITATIONS OF THE DECISIONS BELOW

The decision of the district court is not reported.

The panel opinion of the Third Circuit Court of Appeals is reported at 52 F.3d 1236, *vacated in part*, 52 F.3d 1251 (3d Cir. 1995).

The *in banc* opinion of the Third Circuit Court of Appeals is reported at 80 F.3d 810 (3d Cir. 1996)

BASIS OF JURISDICTION IN THIS COURT

The Third Circuit Court of Appeals filed its *in banc* opinion affirming petitioner's conviction and sentence on April 4, 1996.

This Court has jurisdiction to review the decision of the Third Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(l)

STATUTE INVOLVED

21 U.S.C. § 848(c) provides:

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT OF THE CASE

The instant indictment charged, and Petitioner was convicted of, violations of 18 U.S.C. § 1956, and 21 U.S.C. §§ 841(a)(1), 843(b), 846 and 848. These are "offenses against the laws of the United States" within the meaning of 18 U.S.C. § 3231. Accordingly, the United States District Court for the Eastern District of Pennsylvania, the court of first instance, had subject matter jurisdiction over the underlying criminal case.

On February 12, 1992, an employee of the Federal Express office at the Philadelphia airport became suspicious about the contents of a package which had been presented for shipment to the Los Angeles, California area. He opened the package and found it to contain a large amount of currency, but sent it on its way; however, when another similar package was presented on February 13, 1992, he contacted the security department of the company, which in turn contacted law enforcement authorities. In the course of the next few months, the FBI

checked Federal Express records, seized a number of packages containing cash being sent from the Philadelphia area to the Los Angeles area, and drugs being shipped from Los Angeles to Philadelphia, and finally, on May 29, 1992, secured the first of a series of orders authorizing the interception of wire and electronic communications on telephones subscribed to or used by the subjects of the investigation.

As a result of this electronic surveillance, the seizures and physical surveillance conducted in conjunction with and as a result of the wiretapping, and, ultimately, the cooperation of a number of the subjects of the investigation, the government secured the indictment of sixteen individuals, some from the Los Angeles area and some from Philadelphia and its environs. Petitioner Theodore Edmonds was alleged to have been the Los Angeles-based supplier of cocaine and heroin to Tyria Ekwensi, who, in turn, supplied the drugs to the defendants Carlton Love, Lorenzo Duncan and Russell Freeman, Jr.

According to Ms. Ekwensi, who was the government's principal witness at trial, she met the Petitioner in the summer of 1991; shortly thereafter, she visited him in California, and after she explained to him that she was in dire financial straits as a result of certain reversals she had encountered in her previous drug trafficking activities, he offered, and began to supply her with cocaine for her to resell. Ms. Ekwensi testified that the drugs were sent to her by Federal Express almost from the outset, and, once she began to make return payments on a large and regular basis, defendant-appellant came to Philadelphia and made arrangements for her to begin to send boxes of money to California via Federal Express.

The indictment charged that this pattern of reciprocal shipments of drugs and money by Federal Express continued until the arrest of the principal participants in September of 1992. Petitioner Edmonds, along with the defendants Carlton Love, Lorenzo Duncan, Ernest Hunter and Cora Love, went to trial on the charges contained in the superseding indictment on May 3, 1993, before the Honorable James T. Giles, United States District Judge, and a jury. On May 21, 1993, the jury found him guilty of all charges. Specifically, he was convicted of violation of 18 U.S.C. § 1956, and 21 U.S.C. §§ 841(a)(1), 843(b), 846 and 848 (Engaging in a Continuing Criminal Enterprise). The jury also returned a judgment for the government on Count 28 of the superseding indictment, sounding under 21 U.S.C. § 853, for criminal forfeiture in the amount of $27,000,000.

On September 8, 1993, petitioner was sentenced by Judge Giles to life imprisonment as to the Continuing Criminal Enterprise Count (Count 2), concurrent with life sentences on the substantive violations of 21 U.S.C. § 841(a)(1) contained in Counts 4, 5 and 6,[1] and lesser concurrent terms of imprisonment of 96 months for Counts 11, 12 and 13 (under 21 U.S.C. § 843(b)) and 240 months on Counts 7, 8, 9 and 10 (charging violations of 18 U.S.C. § 1956). He was also ordered to pay special assessments totalling $600, and a fine of $25,000 on each count

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[1] The imposition of concurrent sentences, rather than the vacation of the § 841(a)(1) convictions (over the Petitioner's objection), was in violation of the principle adopted by this Court in *Rutledge v. United States*, ___ U.S. ___, 116 S.Ct. 1241 (1996).

of conviction. On September 15, 1993, Petitioner filed his notice of appeal.

Among other issues raised on appeal, Petitioner challenged his Continuing Criminal Enterprise (CCE) conviction on the basis of the trial court's refusal to give the specific jury unanimity instruction required by the Third Circuit in *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988). *Echeverri* holds that in a Continuing Criminal Enterprise case, the jury must be instructed that it must unanimously agree as to which of the alleged violations constituted the "continuing series" of violations which makes up the CCE offense.

On April 18, 1995, a panel of the Third Circuit Court of Appeals filed an opinion reversing Petitioner's § 848 conviction because of the trial judge's failure to give the *Echeverri* instruction.[2] The government moved for rehearing *in banc*, and the motion was granted (and the previously filed panel

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[2] Vacation of the Petitioner's § 848 conviction was of some real-world significance to him, notwithstanding the fact that he had also been sentenced to three other concurrent terms of life in prison. Because the guidelines as calculated by the trial court mandated a life sentence in connection with the CCE conviction, the trial judge had not made the findings necessary to support the imposition of life terms on the § 841(a)(1) convictions. Accordingly, reversal of the CCE conviction would have required resentencing as to the remaining counts. Since the time of the original imposition of sentence, the Sentencing Guidelines had been changed, effectively reducing the maximum offense level which might have been applied to Petitioner, and under USSG § 1B1.11(a), he would have been entitled to be resentenced under the guideline provisions in effect at the time of the resentencing proceedings.

opinion vacated insofar as it reversed Petitioner's § 848 conviction) on June 29, 1995.

On April 4, 1996, the Third Circuit entered its *in banc* decision. Four opinions were filed. Eight of the fourteen judges reaffirmed the decision in *Echeverri*, but seven of these held that the failure to give the required instruction was harmless error under the circumstances of the case (Judge Stapleton, who had written the panel opinion, dissented in this regard). In addition, three of the judges who voted to overrule *Echeverri* joined in the majority's harmless error analysis (the remaining four judges did not reach the question of harmless error).

REASONS FOR GRANTING THE WRIT

The offense of Engaging in a Continuing Criminal Enterprise, in violation of 21 U.S.C. § 848, is a statutorily created and defined offense of relatively recent origin and a relatively high degree of complexity. The statutory definition of the offense, contained in 21 U.S.C. § 848(c), is predicated upon the commission of a felony violation of Subchapters I or II of Chapter 13, 21 U.S.C. (21 U.S.C. §§ 801-971) as "a part of a continuing series of [such] violations"

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

The "continuing series of violations" language has consistently been read as requiring two things: that there be at least three such violations, and that the violations be related to each other in some way. *See, e.g., United States v. Echeverri, supra; United States v. Jones*, 801 F.2d 304, 307 (8th Cir. 1986); *United States v. Rosenthal*, 793 F.2d 1214, 1226 (11th Cir. 1986). *But see, United States v. Baker*, 905 F.2d 1100, 1102-1105 (7th Cir. 1990), *cert. denied*, 498 U.S. 876, *and cert. denied sub nom. Manns v. United States*, 498 U.S. 904 (1990) (requiring only two predicate offenses).

In *United States v. Echeverri, supra*, the Third Circuit held that, because a "defendant is entitled to have the court insist on unanimous agreement as to all essential elements of the crime charged," a trial judge must, if requested, instruct the jury that it must unanimously agree on which particular violations make up the "continuing series." 854 F.2d *supra* at 643.

Echeverri requires an instruction requiring "jury agreement on both the identity and relatedness" of the predicate violations because the variety of possible permutations of "the menu" of such predicates constitute an array of different "offenses," not merely different "means" of committing but a single offense. (App.15, 19).

As the majority of the *in banc* Third Circuit explained, the *Echeverri* rule is compelled by principles of statutory construction, traditions (and traditional expectations) in criminal jurisprudence, constitutional considerations, and the rule of lenity, consistent with the analysis suggested by *Schad v. Arizona*, 501 U.S. 624 (1991). (App. 10-30). To hold otherwise, Judge Becker's opinion noted, "would allow conviction on jury agreement merely that the

defendant committed some three violations of United States Code, Title 21, Chapter 13, subchapters I and II, even when it is alleged that the defendant committed many different acts occurring at different times and places." (App. 20).[3]

In the case at bar, the *in banc* majority concluded:

> Because there is a "reasonable likelihood," *Estelle v. McGuire*, 112 S.Ct. 475, 482 (1991); *Boyle v. California*, 494 U.S. 370, 380 (1990), that the jury interpreted the district court's general unanimity instructions to require agreement only that *some* three predicate violations occurred and not that the same violations occurred, the district court's failure to give Edmonds's proposed specific unanimity instruction was error.

(App. 30)

The court readily acknowledged that this error "implicates" Petitioner's constitutional right to a unanimous jury – whether that right is seen as grounded in the Fifth or Sixth Amendment, or some combination of the two. (App. 30-31). Noting, however, that "most constitutional errors are subject to the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967)," the court went on to find that the jury's verdict was, to use its term, "salvageable," on the basis that other facts found by the jury were " 'so closely related' to the fact tainted by the erroneous instructions 'that no rational jury could find those facts without also finding [the former] fact . . . .' "

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[3] The *Echeverri* rule is not, however, universally accepted by the Circuits. *See, United States v. Canino*, 949 F.2d 928, 948 (7th Cir. 1991).

(App. 31, 34) (quoting from *Carella v. California*, 491 U.S. 263, 271 (1989)).

It is at this point that the decision of the court below broke free from its constitutional moorings, and it is with respect to the issue of under what circumstances "harmless error" analysis is inappropriate that this Court should grant Certiorari.

Generally speaking, this Court has reserved harmless error analysis for the resolution of questions of whether a procedural error may have undermined the decisionmaking process, rather than situations in which a structural flaw has occurred which has prevented the decisionmaking process from operating according to its design (regardless of whether it may be said, with the benefit of hindsight, that the result reached was a just or unjust one).

This is the import of the Court's decision in *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), which Petitioner maintains, and the panel opinion had found, forecloses harmless error analysis in the case at bar. In *Sullivan*, the trial judge had given an instruction on reasonable doubt which misstated the prosecution's burden of proof. This Court held that the decision rendered by a jury so instructed cannot be considered to represent "the jury verdict required by the Sixth Amendment," since what the Sixth Amendment requires "is a jury verdict of guilty beyond a reasonable doubt." 113 S.Ct. at 2081.

As the *Sullivan* Court observed, since the harmless error analysis adopted by the Court in *Chapman v. California*, 386 U.S. 18 (1967) seeks to determine "not what effect the constitutional error might generally be expected to

have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand," the fact that no "verdict" in the constitutional sense has been rendered makes such analysis inappropriate. 113 S.Ct. at 2081-2082. Since there is no such "verdict" to analyze, there is nothing for a reviewing court to uphold, and for a court to purport to do so would be to impermissibly substitute the court's judgment of what a proper "verdict" might have been for the verdict which the Constitution assures a defendant shall be rendered by a jury. As the Court put it:

> *Chapman* itself suggests the answer. Consistent with the jury-trial guarantee, the question it instructs the reviewing court to consider is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand. *See Chapman, supra,* 386 U.S., at 24, 87 S.Ct., at 828 (analyzing effect of error on "verdict obtained"). Harmless-error review looks, we have said, to the basis on which "the jury actually rested its verdict." *Yates v. Evatt,* 500 U.S. ___ , ___ , 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991) (emphasis added). The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee. See *Rose v. Clark,* 478 U.S. 570, 578, 106 S.Ct. 3101, 3105, 92 L.Ed.2d 460 (1986); id., at 593, 106 S.Ct., at 3114 (BLACKMUN, J., dissenting); *Pope*

v. Illinois, 481 U.S. 497, 509-510, 107 S.Ct. 1918, 1926, 95 L.Ed.2d 439 (1987) (STEVENS, J., dissenting).

> Once the proper role of an appellate court engaged in the *Chapman* inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since, for the reasons described above, there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of *Chapman* review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. *See Yates, supra*, 500 U.S., at ___ – ___ , 111 S.Ct., at 1898 (SCALIA, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach v. United States*, 326 U.S. 607, 614, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

(113 S.Ct. at 2081-2082).

In such a case, the Court noted, if the reviewing court acts on "its view of what a reasonable jury would have

done," then " 'the wrong entity judge[s] the defendant guilty.' " 113 S.Ct. at 2082, quoting from *Rose v. Clark*, 478 U.S. 570, 578 (1986).

Where the structure of the decisionmaking system has broken down, a reviewing court's efforts to "salvage" it (to adopt the terminology of the *in banc* majority) only further compound the damage, by substituting a decision by the wrong decisionmaker for no decision at all. As the *Sullivan* Court specifically noted, it is for this reason that harmless error analysis must be reserved for errors that may have skewed the decisionmaking process, but have not deprived the accused of any of the basic structural components of the process deemed by the Constitution to be "due" him:

> Another mode of analysis leads to the same conclusion that harmless-error analysis does not apply: In [*Arizona v.*] *Fulminante*, [499 U.S. ___, 111 S.Ct. 1246 (1991)] we distinguished between, on the one hand, "structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," and, on the other hand, trial errors which occur "during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Fulminante, supra*, 499 U.S., at ___ , ___ , 111 S.Ct., at 1252, 1254. Denial of the right to a jury verdict of guilt beyond a reasonable doubt is certainly an error of the former sort, the jury guarantee being a "basic protectio[n]" whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function, *Rose, supra*, 478 U.S., at 577, 106 S.Ct., at 3105. The right to trial by jury reflects, we have said,

> "a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U.S., at 155, 88 S.Ct., at 1451. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

(113 S.Ct. at 2082-2083).

The Constitution guarantees a decisionmaking system in criminal cases, the basic elements of which seem to consist, at the very least, of an adversary system in which a trial is conducted by an impartial judge, a defendant has counsel, and a jury makes a determination as to all elements of the offense charged by rendering a "verdict."

The decisions of this Court consistently demonstrate its understanding of the inappropriateness of harmless error analysis in cases involving the deprivation of one of these structural elements of the decisionmaking process: trial before an unbiased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); outright denial of the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1983); or withdrawal of an element of the offense charged from the jury, *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995).

Where the error does not affect the structure of the process, but only the way in which it functions, it is appropriate to measure the impact of the error – because the deprivation involved is always a matter of degree in the first instance. The right to counsel cases well illustrate this distinction: as the Court pointed out in *Strickland v. Washington*, 466 U.S. 668, 692-693 (1984), albeit employing a slightly different rubric: "actual or constructive denial of the assistance of counsel altogether is legally presumed

to result in prejudice," while "claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice."

Likewise, harmless error analysis is appropriate where the only question is one of the reliability of the decision under review – *i.e.*, whether the erroneous admission of evidence, or a misdirection as to the governing law, might have skewed the reliability of the verdict. However, where the flaw is one of structure – where, for example, the decision in question was not made by the appropriate decisionmaker – the fact that the decision made seems to have been the correct one is an inadequate substitute for that which is required: that, whether its results be right or wrong, the correct decisionmaking mechanism must be employed.

Harmless error analysis is, at best, an *ad hoc* undertaking, which may serve to reassure, but can never reconstitute. It allows us to say that the process has worked "the way that it should have," in the sense that a decision with which we are comfortable has been reached. But this is not the same as saying that the process has worked "the way it is required to," in the sense that the decision has been reached through the basic mechanism of decisionmaking that the law requires.

Of course, with respect to this latter question, the matter of whether we are comfortable with result is immaterial – and so harmless error analysis, which focuses *exclusively* on whether the error in question may have undermined our level of comfort in the result (this is the functional equivalent of the question of whether "the error complained of did not contribute to the verdict

obtained," *Chapman v. California, supra,* 386 U.S. at 24) is wholly inappropriate.

Perhaps, for certain cases, a system that assured a greater degree of accuracy than does our constitutionally mandated system of jury trials could be devised – undoubtedly, at least in this decade, involving some computer-driven analytical model. If a defendant's case were diverted from the conventional adjudicative process into this alternative decisionmaking stream, surely the Court would not be diverted from ruling that the defendant had been deprived of that which the Constitution demands, notwithstanding the fact that "harmless error" analysis of all the evidence might assure it that *no* reasonable factfinder (or factfinding process) could or would have produced any other (or more reliable) decision in his case.

Setting these principles in the context of the case at bar, it is clear that the trial court's refusal to give the unanimity instruction mandated by *Echeverri* deprived him of a basic, structural right: that the jury make a determination as to all elements of the offense charged. The *in banc* majority's acknowledgement of a "reasonable likelihood" that the jury would not have understood itself to have been required to unanimously find the Continuing Criminal Enterprise offense to have consisted of "the same violations" (App. 30) is no more than an admission that the jury simply did not decide the "relatedness" element of the offense – because even if the Constitution does not mandate a requirement of unanimity, a decision of a federal jury is simply not a verdict if it is not unanimous. *See, Johnson v. Louisiana,* 406 U.S. 356, 363 (1972). It is difficult to see, given that admission, how any further explication can substitute for the missing jury

finding, no matter what the majority's apparent conclusions regarding the inevitability of such a finding.

This is the central failing of the *in banc* majority's analysis, and is apparent on its face – that the majority felt itself at liberty to substitute its view of the trial evidence for a jury finding which was never made:

> The only finding for which unanimity is potentially lacking is that the same three predicate offenses are related to each other. However, the evidence introduced at trial to show that Edmonds committed each of the predicate offenses established that Edmonds used the same packers and mode of distribution throughout. See *Edmonds*, 52 F.3d at 1243. Edmonds did not argue to the jury – and has not argued since – that any of the predicate offenses were unrelated to the others.[4] Thus, the facts necessarily found by the jury to convict on the predicate offenses show conclusively that all of the predicate offenses are related to each other.
>
> In these circumstances, no rational jury could unanimously find Edmonds guilty of the

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[4] The fact that Petitioner did not argue lack of "relatedness" adds no weight to the majority's position, since the question is not the extent, but the nature of the effect which the instructional error had on the deliberative process. In addition, it is hard to see how such an argument would have been properly made to the jury in the absence of the requested *Echeverri* instruction. And, of course, as this Court pointed out in *Rose v. Clark, supra*, "our harmless-error cases do not turn on whether the defendant conceded the factual issue on which the error bore." 478 U.S. at 583.

> predicate offenses without unanimously finding that the offenses were related to each other.

(App. 35-36).

As Judge Stapleton pointed out in dissent:

> In Edmonds' case, the only unanimous jury finding to which this court can point is a finding that Edmonds committed nine narcotics felonies. That finding is not the functional equivalent of a finding that those felonies were related. It is as consistent with those felonies being unrelated as it is with their being related. My colleagues have not concluded that relatedness necessarily follows from a fact the jury found; *they have, rather, concluded that relatedness necessarily follows from the evidence tendered by the government at trial.* (Emphasis added)

(App. 44).

The *in banc* majority's analysis resembles (and refers to) the analysis in "presumption" cases such as *Rose v. Clark, supra* and *Carella v. California, supra* but the error in the case at bar is not analogous, and the logic of those cases does not apply here. Again, as pointed out by Judge Stapleton, in the presumption cases

> the court could point to an actual finding made by the jury that was the functional equivalent of the element that the jury was required to find in order to support a guilty verdict. In this case, the court has not, and cannot, point to such a jury finding.

(App. 43).

An erroneous presumption may skew the factfinding process, by overly weighting a predicate fact, or the

consequence of a finding, but it still requires the jury to make a logically pertinent finding in the first instance. In the case at bar, the effect of the error was precisely the opposite: the failure to instruct the jury as to what it must find in regard to an essential element of the offense charged in effect *withdrew* from the jury the requirement that it make a finding which it should have been required to make. Once again, *Sullivan* is instructive:

> A mandatory presumption – for example, the presumption that a person intends the ordinary consequences of his voluntary acts – violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Francis v. Franklin, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985)*. But "[w]hen a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt." *Rose v. Clark, 478 U.S. 570, 580, 106 S.Ct. 3101, 3107, 92 L.Ed.2d 460 (1986)*. And when the latter facts "are so closely related to the ultimate fact to be presumed that no rational jury could find those facts without also finding that ultimate fact, making those findings is functionally equivalent to finding the element required to be presumed." *Carella v. California*, 491 U.S. 263, 271, 109 S.Ct. 2419, 2423, 105 L.Ed.2d 218 (1989) (SCALIA, J., concurring in judgment). See also *Pope, supra*, 481 U.S., at 504, 107 S.Ct., at 1923 (SCALIA, J., concurring). A reviewing court may thus be able to conclude that the presumption played no significant role in the finding of

> guilt beyond a reasonable doubt. *Yates, supra,* 500 U.S., at ___ - ___ , 111 S.Ct., at 1893-1894.

(113 S.Ct. at 2082).

In the case at bar (as in *Sullivan,* although for a different reason), the jury's decision only tells us that the jury unanimously found that Petitioner committed the violations of 21 U.S.C. §§ 841(a)(1) and 843(b) alleged in the indictment. A unanimous finding of relatedness as to any or all of those violations as identifying the CCE violation is in no way a logical consequence (or equivalent) of this finding, no matter how strongly the trial evidence might support such a finding. Indeed, nothing in the jury's verdict tells us that the jury also unanimously found that *any* of those violations were so related as to constitute the CCE offense.

The Continuing Criminal Enterprise count of the Indictment in the case at bar (Count Two) alleged, in pertinent part, that Petitioner:

> violated one or more provisions of subchapter I of Chapter 13 of Title 21, United States Code, which are felonies, and such violations were part of a continuing series of violations of subchapter I of Title 21, *including but not limited to* Counts One, Four, Five, Six, Seven, Eleven, Twelve and Thirteen of this Indictment; (Emphasis supplied)

Under this charge, the jury might have found (or not found) that the Petitioner was guilty of the offense of engaging in a continuing criminal enterprise by virtue of his involvement in a "continuing series" of related violations made up of any three or more of the enumerated

counts of the indictment,[5] *or any other violations of subchapter I of Chapter 13 of Title 21 whatsoever.* The identity of the offense of which he might have been (or was) convicted was amorphous and unlimited, and could only be established by the jury's unanimous finding of a continuing series of related violations from the array of possibilities offered it.

The government offered weeks of testimony (of varying degrees of reliability) regarding literally hundreds of alleged violations, both charged and uncharged, and offered the jury a virtually unlimited "menu" (to use the *in banc* majority's term) from which to assemble (or not) a version of the offense charged for their verdict. The instruction required by *Echeverri*, and by the *in banc* majority, was necessary to ensure that the jury did in fact, *as a jury*, decide that the Petitioner committed a particular CCE offense – made up of a specific continuing series of related violations. Without such an instruction, the jury cannot but have failed to have decided that question, and without such a decision, *Sullivan* teaches, the jury simply cannot be said to have reached a "verdict."

The decision below pays lip service to the principles outlined in *Sullivan*, but in the end merely does what *Sullivan*, and the logic underlying it forbids: to "hypothesize" a verdict based upon its belief in "how inescapable the findings to support that verdict might be" – and in so

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[5] Actually, relatedness aside, a violation of Count Two could not be made out with reference to Count Seven of the Indictment, since it alleged a violation of 18 U.S.C. § 1956, which may not serve as a § 848 predicate.

doing, to "violate the jury-trial guarantee." 113 S. Ct. at 2082.

CONCLUSION

The decision of the Third Circuit Court of Appeals is based on a fundamentally flawed understanding of the place of harmless error analysis in the adjudication of constitutional errors, and in direct conflict with this Court's decision in *Sullivan v. Louisiana, supra*. This Court should grant Certiorari and, upon plenary hearing, reverse the decision of the court below affirming Petitioner's conviction and sentence for engaging in a continuing criminal enterprise.

Respectfully submitted,

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DATED: July 2, 1996

Filed April 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1890

UNITED STATES OF AMERICA

v.

THEODORE EDMONDS,

Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Criminal No. 92-cr-00504-1)

Argued: October 24, 1994

Before: STAPLETON, HUTCHINSON, and GARTH,
Circuit Judges.

(Opinion Filed: April 18, 1995; vacated June 29, 1995)

Reargued *In Banc:* October 25, 1995

Before: SLOVITER, Chief Judge, BECKER, STAPLETON,
MANSMANN, GREENBERG, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN,
and GARTH
Circuit Judges.

(Filed April 4, 1996)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

A federal jury convicted appellant Theodore Edmonds of violating the Continuing Criminal Enterprise statute ("CCE"), 21 U.S.C. § 848, which makes it a crime to organize, supervise, or manage five or more persons in a "continuing series of violations" of the federal narcotics laws. Edmonds argues that the district court erred in failing to instruct the jurors that, in order to convict, they must agree unanimously on which violations – of the eight alleged – constituted the three related violations necessary to establish a "continuing series."

In *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988), we held that the CCE statute requires jury unanimity as to the identity of each of the three related violations comprising the continuing series. This *in banc*[1] rehearing gives us the opportunity to reconsider *Echeverri*. The question of the degree of jury unanimity required by the CCE statute is a difficult one, and other courts of appeals have disagreed with *Echeverri's* resolution, *see, e.g., United States v. Canino*, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 504 U.S. 910, *and cert. denied sub nom. Flynn v. United States*, 503 U.S. 996 (1992). Nevertheless, guided by historical tradition in criminal jurisprudence, constitutional considerations, and the rule of lenity, we reaffirm *Echeverri* and hold that the CCE statute requires juror unanimity as to the identity of the related violations comprising the continuing series.

In view of this holding, we must also decide whether the district court's failure to give the proper unanimity instruction was harmless error. This task requires us to examine the scope of *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), which held that an erroneous reasonable doubt instruction cannot be harmless because such error undermines an essential premise of harmless error analysis – the existence of an actual verdict of guilty beyond a reasonable doubt. *Id.* at 2082.

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[1] This may be one of this court's last *"in banc"* opinions. Until recently, we have eschewed the more common *"en banc"* spelling in favor of the latin form. However, a proposed amendment to the Federal Rules of Appellate Procedure adopts the *"en banc"* spelling. *See* Fed R. App. P. 35 (Preliminary Draft of Proposed Amendment September 1995).

We conclude that *Sullivan* does not preclude harmless error analysis in this case. Unlike the verdict in *Sullivan*, in which an erroneous reasonable doubt instruction undermined all of the jury's findings, the jury in this case delivered valid findings on essentially all of the elements of the offense by convicting Edmonds of every violation alleged to constitute the continuing series. These convictions do not themselves show unanimous agreement that the same three violations were sufficiently *related* to each other to constitute a continuing series. However, the evidence that the jury must have credited to find Edmonds guilty of the predicate violations unequivocally established that all charged violations were related. In such circumstances, no rational jury could unanimously find Edmonds guilty of the predicate offenses without unanimously finding that the offenses were related to each other. We thus affirm Edmonds's conviction.

I. Facts and Procedural History

The facts of this case are fully set out in the earlier panel opinion, *see United States v. Edmonds*, 52 F.3d 1236, 1241 (3d Cir.), *vacated in part*, 52 F.3d 1251 (3d Cir. 1995); thus, we provide only a brief summary. The evidence at trial showed that Edmonds led a nationwide cocaine and heroin distribution network. The organization was based in Los Angeles, California and sold drugs to distributors for resale in various locales, including Chester and Philadelphia, Pennsylvania; Wilmington, Delaware; Wilmington, North Carolina; Detroit, Michigan; New Orleans, Louisiana; and Toledo, Ohio.

A federal grand jury returned a twenty-seven count indictment against Edmonds and eleven other people. The indictment charged Edmonds with conspiracy to distribute cocaine and heroin in violation of 21 U.S.C. § 846; distribution of heroin and aiding and abetting distribution in violation of 21 U.S.C. § 841(a)(1); two counts of distribution of cocaine and aiding and abetting distribution in violation of 21 U.S.C. § 841(a)(1); three counts of unlawful use of a communications facility in violation of 21 U.S.C. § 243(b); and four counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i) & (2). In addition, the indictment charged Edmonds with engaging in a CCE in violation of 21 U.S.C. § 848. The CCE count identified eight predicate offenses: the conspiracy count, the three distribution counts, the three communications facility counts, and one of the money laundering counts.[2]

At trial, the district court gave the following instruction concerning the CCE charge:

> So the Government has to prove that he [Edmonds] committed a felony in violation of narcotics laws; i.e.[,] that in some way he was causing or attempting to cause the distribution of cocaine and heroin as charged in Count 1 of the indictment or in other counts charged in the indictment.

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[2] The indictment's inclusion of the money laundering offense, 18 U.S.C. § 1956, as a CCE predicate offense appears to be in error. *See* 21 U.S.C. § 848(c) (defining CCE predicate offenses as violations of U.S. Code Title 21, Chapter 13, subchapter I or II). However, Edmonds has not raised this issue, and we thus deem it waived.

> The Government has to prove secondly that such violation was part of a continuing series of related violations of the federal narcotics laws. A continuing series of violations requires proof beyond a reasonable doubt that three or more violations of the laws occurred and that they, those three or more, were related to each other.

App. 577. The court rejected Edmonds's request that it explain to the jurors that they must unanimously agree on which three related violations occurred. Instead, the court gave only general unanimity instructions. *See, e.g.*, App. 581 ("You are asked to deliberate with a view towards reaching a unanimous decision with respect to each count and each defendant charged here in this indictment."). The jury convicted Edmonds of all counts.

A panel of this Court reversed Edmonds's CCE conviction. The panel's decision was based on *United States v. Echeverri*, which held that a district court's refusal to give a specific unanimity instruction in a CCE trial is reversible error. *See Echeverri*, 854 F.2d at 643. The panel found *Echeverri* controlling despite a significant difference between the two cases. In *Echeverri*, the government had introduced evidence of a plethora of drug-related activity to establish the continuing series, and, because the jury did not hand down verdicts on the separate predicate offenses, it was unclear whether the jury agreed that the same three predicate violations occurred. *See id.* at 642-43. In contrast, Edmonds's jury convicted him of each of the narcotics violations alleged to constitute the continuing series, and hence it must have unanimously agreed that Edmonds committed every violation in the alleged series. Nevertheless, the panel found *Echeverri* controlling

because the jury may not have agreed on which three offenses were related to each other. For example, six jurors may have felt that violations A,B, & C (but no others) were related, and the other six jurors may have concluded that violations D, E, & F (but no others) were related. *See Edmonds*, 52 F.3d at 1241.

The panel then held that harmless error analysis was inapplicable. Although the evidence that the jury must have believed to find Edmonds guilty of the predicate offenses also established a single ongoing scheme, the panel reasoned that *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), barred it from engaging in harmless error analysis. Sullivan held that a constitutionally deficient reasonable doubt instruction cannot be harmless because the error precludes the existence of a guilty verdict upon which harmless error scrutiny could operate. *Id.* at 2082.[3] Analogizing lack of jury unanimity to an unconstitutional definition of reasonable doubt, the panel held that "there has been no actual jury finding of guilty on the CCE charge," and thus that it could not rule that the error was harmless. *Edmonds*, 52 F.3d at 1244.

The government petitioned for rehearing, arguing that *Schad v. Arizona*, 501 U.S. 624 (1991), and *United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989), have undermined *Echeverri's* specific unanimity holding; the government also attacked the panel's harmless error analysis. We granted the petition and reheard the case *in banc*.

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[3] In *Sullivan*, the trial judge gave a definition of reasonable doubt virtually identical to one held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39, 111 (1990) (per curiam).

II. The CCE Statute & Specific Juror Unanimity

To convict a defendant under the CCE statute, the government must prove: (1) that the defendant committed a felony violation of a provision of United States Code Title 21, Chapter 13, subchapter I or II (various drug offenses); (2) that this violation was part of a "continuing series" of violations of these subchapters; (3) that the defendant, in committing the continuing series of violations, acted as an organizer, supervisor, or manager of five or more other persons; and (4) that the defendant obtained "substantial income or resources" from such activities.[4]

Only the second requirement – that the defendant committed a felony as part of a continuing series of violations – is at issue in this appeal. We have held, as

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[4] In relevant part, 21 U.S.C. § 848 states:

> [A] person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

have most courts of appeals, that a "series" consists of at least three predicate violations. *See Echeverri*, 854 F.2d at 643; *see also, e.g., United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1570 (9th Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990); *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), *cert. denied sub nom. Myers v. United States*, 470 U.S. 1084 (1985). *But see United States v. Baker*, 905 F.2d 1100, 1102-05 (7th Cir. 1990) (requiring only two predicate offenses), *cert. denied*, 498 U.S. 876, *and cert. denied sub nom. Manns v. United States*, 498 U.S. 904 (1990). Furthermore, because the series must be "continuing," the three predicate offenses must be related to each other in some way. *See, e.g., United States v. Jones*, 801 F.2d 304, 307 (8th Cir. 1986); *Baker*, 905 F.2d at 1104.

As we have explained, the critical question is whether the jury need unanimously agree only that the defendant committed three related violations or whether, instead, the jury must unanimously agree that the *same* three related violations occurred. Although it is well settled that a defendant in a federal criminal trial has a constitutional right to a unanimous verdict, *see, e.g., Andres v. United States*, 333 U.S. 740, 748-49 (1948); *Patton v. United States*, 281 U.S. 276, 288-90 (1930); *see also* Fed. R. Crim. P. 31(a), the level of factual specificity on which the jury must be unanimous is far from clear. In *Schad v. Arizona*, 501 U.S. 624 (1991), a plurality of the Supreme Court shed some light on this question. *Schad* indicates that the scope of jury unanimity is primarily a question of legislative intent, although due process limits the legislature's definitional power.

Following *Schad*, we view the CCE unanimity question principally in terms of congressional intent. We recognize that, on its face, the CCE statute gives little indication of Congress's intent with respect to jury unanimity. Nevertheless, guided by historical tradition, constitutional considerations, and the rule of lenity, we conclude that a statute combining formerly separate crimes – crimes that may take place at different times and at different places – should generally be read to require unanimity as to each predicate offense. Here, because there is no indication of intent to the contrary, we hold that in order to convict a defendant under the CCE statute, the jury must unanimously agree that the same three related predicate offenses occurred.

A. The Analytic Framework

In *Schad v. Arizona*, 501 U.S. 624 (1991), a four-Justice plurality concluded that when a statute enumerates alternative routes for its violation, whether jurors must be unanimous with respect to a particular route depends on two questions. First, did the legislature intend the different routes to establish separate "offenses," for which unanimity is required as to every fact constituting the offense, or different "means" of violating a single offense, for which unanimity is not required? Second, if the legislature intended the alternative routes to be mere means of violating a single statute, is the statute's definition of the crime unconstitutional under the Due Process Clause?

Edward Harold Schad was convicted under an Arizona statute that defined first degree murder as "murder which is . . . wilful, deliberate or premeditated . . . or

which is committed . . . in the perpetration of, or attempt to perpetrate, . . . robbery." *Id.* at 628 (quoting Ariz. Rev. Stat. § 13-452 (Supp. 1973)). At trial, the prosecutor advanced theories of both premeditated murder and felony murder, and the trial court gave only a general unanimity instruction (i.e., that all jurors must agree on whether the defendant is guilty or not guilty). On appeal, Schad argued that the state trial court had erred in not requiring the jury to agree on a single theory of first degree murder. The Arizona Supreme Court affirmed Schad's conviction, stating, "In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. . . . [T]he defendant is not entitled to a unanimous verdict on the manner in which the act was committed." *Id.* at 629 (plurality opinion) (quoting *State v. Schad*, 788 P.2d 1162, 1168 (Ariz. 1989)).

A divided United States Supreme Court affirmed the Arizona Supreme Court's judgment. In an opinion joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, Justice Souter analyzed the problem in terms of due process limits on the legislature's power to define criminal conduct, and not as a jury unanimity issue. *Id.* at 630-31 (plurality opinion).[5] Because the Arizona Supreme Court, the final interpreter of Arizona law, had held that felony murder and premeditation were merely different "means" of committing a single "offense," the intent of

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[5] Justice Scalia joined part of Justice Souter's opinion, not relevant to this case, dealing with the right to have the jury instructed on a lesser included offense in capital cases.

the Arizona legislature had been conclusively established, and Schad's jury was unanimous on all the facts necessary to establish the offense. *See Schad*, 501 U.S. at 630-31. Thus, it was unnecessary to decide whether a criminal defendant has a right to a unanimous verdict in a state capital case.[6]

The remaining issue was whether Arizona's definition of the crime is constitutional under the Due Process Clause. The plurality concluded – and Justice Scalia seemed to agree – that due process limits the legislature's "capacity to define different courses of conduct . . . as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which course . . . actually occurred." *Id.* at 632 (plurality opinion); *see also id.* at 650-52 (Scalia, J., concurring in the judgment) (recognizing due process limitation).

The plurality described this due process concern as analogous to vagueness:

> The axiomatic requirement of due process that a statute may not forbid conduct in terms so vague that people of common intelligence would be relegated to different guesses about its meaning carries the practical consequence that a defendant charged under a valid statute will be

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[6] Although the Sixth Amendment requires a unanimous verdict in federal criminal trials, it does not so require in state trials. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 404 (1972). In *Schad*, Schad argued that the Sixth, Eighth, and Fourteenth Amendments require a unanimous jury in state *capital* cases. As mentioned, the Court did not reach this question.

> in a position to understand with some specificity the legal basis of the charge against him. Thus it is an assumption of our system of criminal justice " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' " that no person may be punished criminally save upon proof of some specific illegal conduct. Just as the requisite specificity of the charge may not be compromised by the joining of separate offenses, nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, would suffice for conviction.

Id. at 632-33 (plurality opinion) (citations and footnote omitted).

The plurality's due process test looked to "history and wide practice as guides to fundamental values, as well as to narrower analytic methods of testing the moral and practical equivalence" of alternative means of satisfying an element of an offense. *Id.* at 637. Finding ample historical evidence that murder has been defined as killing another with "malice aforethought" (of which the intent to kill and the intent to commit a felony were alternative aspects), that a significant number of other states defined murder in the same way that Arizona did, and that a moral equivalence between the two means could be found on the facts of the case, Justice Souter concluded that the Arizona statute was constitutional.

Concurring in the judgment, Justice Scalia agreed that the statute at issue was constitutional under the Due

Process Clause, but disagreed as to the appropriate constitutional test. He argued that due process is defined solely in terms of historical practice, at least when the procedure at issue has historical roots. *See id.* at 650 (Scalia, J., concurring in the judgment). Because of the ample historical evidence cited by the plurality, Justice Scalia agreed with its judgment. *Id.* at 651.

Justice White dissented in an opinion joined by Justices Marshall, Blackmun, and Stevens. Grounding his analysis in *In re Winship*, 397 U.S. 358, 364 (1970), which requires "proof beyond a reasonable of every fact necessary to constitute the crime," Justice White opined that the verdict at issue provided "no clues whether the jury agrees that the three elements of premeditated murder or the two elements of felony murder have been proved beyond a reasonable doubt." *Schad*, 501 U.S. at 655 (White, J., dissenting).

B. The Analysis Applied to the CCE Statute

Unlike the Supreme Court in *Schad*, which was bound by the Arizona Supreme Court's interpretation of state law, we must interpret the CCE statute. In relevant part, 21 U.S.C. § 848 provides:

> [A] person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of this subchapter or subchapter II of this chapter –

21 U.S.C. § 848(c). In the language of Schad, the question is whether the menu of predicate violations specified by subchapters I and II are different "means" or different "offenses."[7] In other words, do the provisions represent various ways to commit the CCE crime, like shooting, drowning, etc. for a murder statute? Or do they represent

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[7] Our inquiry is not, as Judge Alito suggests, whether Congress intended to include "a special jury-unanimity requirement." Rather, we must determine, as we do with all statutes, what *level* of unanimity Congress intended. In *Schad's* terms, the question is whether Congress intended a given fact to be an "element." When a legislature enacts a statute, the legislature determines that certain facts are "elements," i.e., that they are "indispensable to proof of a given offense." *Schad*, 501 U.S. at 633 (plurality opinion). The characterization of a fact as an "element" then carries the consequence that the jury must agree that the fact occurred in order to convict. *See, e.g., id.* at 639 ("The essence of petitioner's argument is that, despite [the Arizona Supreme Court's] unitary definition of the offense, each of these means must be treated as an independent element as to which the jury must agree. . . . ").

When the object of our statutory interpretation inquiry is correctly identified, Judge Alito's criticisms fall short. That Congress has not generally adopted "special unanimity requirements" or that Congress can be explicit when it wants "special unanimity requirements" is immaterial. Congress determines "elements," and hence, what facts require unanimous jury agreement, every time it passes a criminal statute. For example, we would not allow a conviction to stand for murder under 18 U.S.C. § 1111 without unanimous agreement that someone was killed. Congress has made the unlawful killing of a human being an "element" for which unanimity is required. (Of course, the present inquiry is more difficult than this example, because we must inquire whether the CCE statute creates more than one offense, *see infra* note 8, each with its own elements).

different crimes themselves, such that the jury must agree which particular related violations were committed?[8]

The statute lends itself to either interpretation. On the one hand, the statute is triggered by violation of "*any* provision" as part of a "continuing *series* of violations." By placing no emphasis on the particular, the statute

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[8] The *Schad* plurality recognized that a single statute offering alternative routes of violation may create multiple offenses for which unanimity is required. For example, in rejecting the dissent's mode of analysis, the plurality stated:

> In the dissent's view, whenever a statute lists alternative means of committing a crime, "the jury [must] indicate on which of the alternatives it has based the defendant's guilt," even where there is no indication that the statute seeks to create separate crimes. This approach rests on the erroneous assumption that any statutory alternatives are ipso facto independent elements defining independent crimes under state law, and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime. In point of fact, . . . legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes. The question whether statutory alternatives constitute independent elements of the offense therefore does not, as the dissent would have it, call for a mere tautology; rather it is a substantial question of statutory construction.

Schad 501 U.S. at 635-36 (plurality opinion) (footnotes and citations omitted). The plurality's statement that "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes" implies that the plurality believes legislatures sometimes do intend to define separate crimes when they enumerate alternative ways of committing a crime.

could be read to say that different routes of violation are fungible alternatives, suggesting that the provisions are mere "means."

On the other hand, the different ways of violating the CCE statute are themselves separate offenses defined in the United States Code. The predicate violations are things which, by definition, Congress views as separate offenses. *Cf. Babb v. United States*, 218 F.2d 538, 539-40 & n.3 (5th Cir. 1955) ("The statute under which this prosecution is lodged [18 U.S.C. § 545] defines two separate types of offenses [because] [t]he first paragraph . . . was derived from 19 U.S.C. § 1593(a), which in turn had as its source R.S. § 2865. . . . [and] [t]he second paragraph . . . was derived from 19 U.S.C. § 1593(b), which in turn had as its source R.S. § 3082."). Thus, we find the language of the statute inconclusive.[9]

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[9] If the correct statutory analysis is used (i.e., whether Congress intended the different alternatives of violating the CCE statute to constitute separate "offenses"), Judge Alito's argument that the CCE statute is unambiguous is not tenable. The alternatives at issue here – "violat[ions of] any provision of this subchapter or subchapter II of this chapter" – are themselves defined as separate crimes. It is far from clear whether Congress intended these alternatives to lose their status as separate offenses when then they were incorporated by reference into a new statute.

Judge Alito's dispute with our statutory analysis is really a dispute over the appropriate default rule for interpreting congressional silence. He criticizes us for failing to anchor our analysis in the text or legislative history of the CCE statute, but he cites no text or legislative history in support of his view that CCE predicate offenses are not "elements" for which unanimity is required. The reason for both our omissions is sound; the statute is simply silent on this issue.

Legislative history also provides little help here. Neither party cited any legislative history, and our own research failed to turn up any probative evidence. Indeed, the opaqueness of the "continuing series" requirement was a matter of concern to some members of Congress. *See* H.R. Rep. No. 1444, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4651 (stating "additional views" of some committee members that "it is not at all clear what constitutes a 'continuing series of violations' ").

At least one circuit – the Seventh – has argued that the purpose of the CCE statute sheds light on Congress's intent.

> The point of the CCE statute is to impose special punishment on those who organize and direct a significant number of larger scale drug transactions; the exact specification by unanimous jury consent of any particular three . . . offenses is irrelevant to any theory about why punishment should be enhanced for such uniquely antisocial activity.

United States v. Canino, 949 F.2d 928, 948 (7th Cir. 1991). We think this argument proves too much: the punitive purpose of a criminal statute will never be served by providing more procedural protections to the defendant. Furthermore, even a more nuanced inquiry into a statute's purpose is unlikely to provide insight. A statute's broad goal says little about whether different acts falling within the statute are means or offenses, or about the requisite degree of jury agreement.

Although we are skeptical that the first prong of the *Schad* analysis – examining whether the legislature, in

enumerating alternatives, intended to create a single or multiple offenses – has much predictive force, we must perforce attempt to work with *Schad*.[10] In doing so, we acknowledge that the CCE statute offers little explicit guidance on Congress's intent. We therefore turn to several background interpretive principles, which, we conclude, establish that Congress did intend to require jury unanimity as to the CCE predicate offenses.[11]

1. Background Interpretive Principles
a. Tradition in Criminal Jurisprudence

We look first to general historical tradition in criminal jurisprudence. Criminal trials have long ensured substantial jury agreement as to the facts establishing the offense. This is because criminal statutes and the common law have generally defined crimes in terms of conduct (and accompanying mental state) that takes place in a single place at some specific time. For example, murder statutes require that the defendant killed some other person, an act occurring in some specified time and place. Thus, when a jury delivers a general guilty verdict for

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[10] Arguably, rather than looking to the legislature's intent, it would be preferable to ask, in the first instance, whether differences between statutory alternatives are so important that the lack of jury agreement as to a specific alternative casts too much doubt on the accuracy of the verdict. *See* Scott W. Howe, *Jury Fact-Finding in Criminal Cases*, 58 Mo. L. Rev. 1 (1993). Hopefully, the Supreme Court will revisit this question soon.

[11] We use the phrase "jury unanimity as to the CCE predicate offenses" to mean jury agreement on both the identity and relatedness of the three offenses.

such a crime, we are confident that the jury agreed on most of the actions engaged in by the defendant. When there is a real risk that a jury will convict without agreement on a discrete set of actions, courts have required specific unanimity instructions. *See, e.g., United States v. Holley*, 942 F.2d 916, 928-29 (5th Cir. 1991) (reversing a conviction for perjury because the district court's instructions allowed the jury to convict without agreement as to a particular false statement), *cert. denied*, 114 S.Ct. 77 (1993). In our view, substantial agreement on a discrete set of actions is essential to ensure that the defendant is guilty beyond a reasonable doubt of some specific illegal conduct. *See Howe, supra* n. 10.

In the face of this tradition, we cannot read from Congress's silence that it intended CCE predicate offenses to constitute mere means of violating a single CCE offense. To do so would allow conviction on jury agreement merely that the defendant committed some three violations of United States Code, Title 21, Chapter 13, subchapters I and II, even when it is alleged that the defendant committed many different acts occurring at different times and places. This is a wholly different situation from the one at issue in Schad. Indeed, as Justice Scalia pointed out in criticizing the plurality's moral equivalence test of constitutionality, "We would not permit, for example, an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday, despite the 'moral equivalence' of those two acts." *Schad*, 501 U.S. at 651 (Scalia, J., concurring in the judgment).[12]

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[12] Judge Alito challenges our reading of history, arguing that it is not true (1) that the jury has always been required to

b. Constitutional Considerations

Constitutional considerations also guide our analysis. There is a real possibility that the CCE statute would violate the Due Process Clause absent a specific unanimity requirement. *See* Eric S. Miller, Note, *Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts*, 104 Yale L.J. 2277 (1995). "[W]here a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [our] duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909).

Both the *Schad* plurality and Justice Scalia agree that due process is defined in part by historical practice. As mentioned, interpreting predicate offenses as different means of violating a single continuing series element marks a departure from historical guarantees on the degree of factual agreement necessary to establish a conviction. And, of course, on a more specific level, there is

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"agree[ ] on most of the actions engaged in by the defendant"; nor (2) that the prosecution has always been required to establish the "specified time and place" where a charged offense occurred. But this response, which artificially atomizes our position, is fundamentally flawed. Although each of Judge Alito's propositions is correct in isolation, the question is whether convictions have been allowed to stand where the jury disagrees on both (1) most of the defendant's actions; *and* (2) the time and place the crime occurred. If the CCE predicate offenses are not elements upon which the jury must agree, that is what the CCE statute would allow.

no historical analogue to the CCE statute. The first complex criminal statutes like the CCE law appeared only in 1970. *See Miller, supra*, at 2280 & nn. 12-14.[13] We recognize that "history [is] less useful as a yardstick in cases dealing with modern statutory offenses lacking clear common law roots." *Schad*, 501 U.S. at 640 n. 7 (plurality opinion). But to the extent history has any force, it counsels against interpreting CCE predicate violations as means, for which unanimity is not required.

Moreover, in addition to historical practice, the Schad plurality believed that due process requires that different means, for which unanimity is not required, must reflect notions of "equivalent blameworthiness or culpability." *Schad*, 501 U.S. at 643 (plurality opinion). If the predicate

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[13] Judge Garth asserts that the law of conspiracy provides a historical analogue to the continuing series requirement, because, he argues, a defendant can be convicted of conspiracy without jury agreement as to which object, of various objects alleged, forms the basis of the conspiracy. We disagree. First, we are skeptical of Judge Garth's premise. At some point, different alleged conspiracy objects suggest such disparate fact patterns that jury agreement as to the precise object of the conspiracy is necessary to support conviction. *See United States v. Castro*, 887 F.2d 988, 993 (9th Cir. 1989) ("A unanimity instruction as to the particular objects of a charged conspiracy is appropriate where it appears that a conviction might rest upon different jurors having found the existence of different facts. . . . "); *accord United States v. Feldman*, 853 F.2d 648, 653 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989). Second, even assuming Judge Garth's view of conspiracy law is correct, the object of a conspiracy – the purpose of the conspiratorial agreement – is hardly analogous to the continuing series requirement, which requires three completed acts (with accompanying mental states) that themselves constitute separate crimes.

offenses are interpreted as means, we suspect that the CCE statute may have serious problems meeting this requirement. A violation of any provision of U.S. Code Title 21, Chapter 13, subchapter I or II can serve as a predicate offense. *See* 21 U.S.C. § 848(c). Predicate offenses thus range from simple possession of marijuana, 21 U.S.C. § 844, to the distribution of cocaine or heroin, 21 U.S.C. § 841. The disparate penalties imposed for different violations – generally no more than a year in prison for the first-time offense of simple possession, *see* 21 U.S.C. § 844(a), compared to a *minimum* of ten years in jail for distributing a large quantity of drugs, *see* 21 U.S.C. § 841(b)(1)(A) – cast serious doubt on whether different predicate offenses (at least these different offenses) can be characterized as equally blameworthy.[14] These potential constitutional problems – both equivalent blameworthiness and lack of a historical analogue – also lead us to interpret the CCE predicate violations as elements of different offenses, for which unanimity is required.

Judge Garth criticizes this analysis, because, in his view, Congress has "already determined" that different predicate offenses are equally blameworthy by making

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[14] The predicate offenses involved in this case do not pose the severe disparate culpability problem identified in the hypothetical above, and thus Edmonds is not in a position to challenge the CCE statute's constitutionality on this basis. *See Schad*, 501 U.S. at 644 ("The question is whether felony murder may ever be treated as the equivalent of murder by deliberation, and in particular whether robbery murder *as charged in this case* may be treated as thus equivalent.") (emphasis added). However, the possibility of constitutional problems in other cases is an important consideration in our interpretive inquiry.

them alternative routes of violating the same statute. But this view fundamentally misunderstands the nature of the "equivalent blameworthiness" analysis. The *Schad* plurality's test is a check on the legislature's power: its purpose is to decide whether different routes of violating the same statute are so morally disparate that a legislature cannot constitutionally treat them as mere means. Thus, the mere fact that Congress has established alternative routes of violating the same statute shows only the need for the equivalent blameworthiness analysis; it cannot answer the question.

Judge Garth also suggests that the equivalent blameworthiness test is a pointless exercise: even if different predicate offenses are so morally disparate that a specific unanimity instruction is required, he argues, a defendant could still be convicted under the CCE statute for widely different offenses. While this argument points out another potential problem with the CCE statute – one not at issue on this appeal – it does not undermine the utility of the equivalent blameworthiness test.

c. The Rule of Lenity

Finally, requiring specific unanimity is counseled by concerns underlying the rule of lenity. That rule – requiring ambiguous criminal statutes to be construed in favor of the defendant – is applied both to the scope of conduct covered by a criminal statute and to the extent of the penalties imposed. *See, e.g., Bifulco v. United States*, 447 U.S. 381, 387 (1980) ("In past cases the Court has made it

clear that [the rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.") (citations omitted). According to the Supreme Court, the rule ensures "there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990) (citing *Liparota v. United States*, 471 U.S. 419, 427 (1985); *United States v. Bass*, 404 U.S. 336, 347-48 (1971)).

The rule of lenity is not directly applicable to the question whether a single statute creates multiple offenses for purposes of jury unanimity. However, the rule has been applied to a conceptually analogous situation: whether a single criminal act constitutes one or more violations of a statute. *See Ladner v. United States*, 358 U.S. 169 (1958) (a single discharge of a shotgun wounding two federal officers constitutes a single violation of 18 U.S.C. § 254 (1940)); *Bell v. United States*, 349 U.S. 81 (1955) (transporting two women across states lines constitutes a single violation of the Mann Act); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952) (each breach of Fair Labor Standards Act duty to a single employee in any single workweek does not constitute a separate offense).

Moreover, the principles motivating the rule have considerable force here. Several cases – those addressing the penalties a defendant will receive – suggest that people deserve warning not only of the boundaries of criminal conduct, but also of the *repercussions* of crossing those boundaries. For example, in *United States v. Granderson*, 114 S.Ct. 1259, 1261 (1994), the Court addressed the meaning of "the original sentence" in a statute providing

that if a person serving a sentence of probation possesses illegal drugs, "the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the *original sentence*." 114 S.Ct. 1259, 1261 (1994) (quoting 18 U.S.C. § 3565(a)) (emphasis added). Because the phrase was ambiguous, the Court applied the rule of lenity and interpreted the phrase to mean the applicable Guidelines sentence of imprisonment, not the revoked term of probation, resulting in a much shorter sentence. *Id.* at 1267-68. In that case, the defendant's conduct – possessing illegal drugs while on probation – was clearly illegal and the only question was the harshness of the penalty. The court's opinion thus implies that fair warning as to the harshness of criminal penalties is an important concern. *Accord Bifulco v. United States*, 447 U.S. 381, 400 (1980) (applying rule of lenity in deciding what punishment is authorized by a statute); *Ladner v. United States*, 358 U.S. 169, 178 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.").

Procedural protections at trial are inherently linked to such repercussions, for these protections affect the likelihood that a penalty will be imposed. At some point, differences in procedural protections become as significant as different penalties, and the need for fair warning just as critical. The degree of jury unanimity required by a statute is important enough a protection that we hesitate to interpret an ambiguous statute to require less, rather than more, unanimity.

Just as in the rule of lenity cases, we are faced with an ambiguous statute. *See Smith v. United States*, 113 S.Ct. 2050, 2059 (1993) (rule of lenity "is reserved for cases where, [a]fter seiz[ing] every thing from which aid can be derived, the Court is left with an ambiguous statute.") (quoting *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))) (internal quotations omitted). As mentioned, the language and legislative history of the CCE statute provide no clue as to Congress's view of specific unanimity. In such a situation, principles underlying the rule of lenity, in conjunction with the other principles we have discussed, lead us to read the CCE statute to require unanimity as to each predicate offense.

2. Reconciling *United States v. Jackson*

The government argues that requiring specific unanimity as to predicate offenses would conflict with *United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989), which held that, in a CCE prosecution, unanimous agreement is not required as to the identity of the five or more underlings supervised, organized, or managed by the defendant. *See also United States v. Canino*, 949 F.2d 928, 946 (7th Cir. 1992) (criticizing the apparent inconsistency between *Jackson* and *Echeverri*). However, a proper understanding of congressional intent shows that *Echeverri* and *Jackson* are quite consistent.

In *Jackson*, we considered whether, in a CCE prosecution, unanimous agreement is required as to the identity of the five or more underlings supervised, organized, or

managed by the defendant. We concluded that the primary concern of the five or more persons requirement is "that the organization in which the defendant played a leadership role was sufficiently large to warrant . . . enhanced punishment," and held that unanimity on the specific identity of the underlings is not required. *Id.* at 88.

Jackson's holding is consistent with our holding here for two reasons. First, unlike the continuing series requirement, the five-person requirement has a historical analogue in the law of conspiracy, which generally has not required the jury to unanimously agree on the identity of the defendant's co-conspirators. *See United States v. Harris*, 959 F.2d 246, 256 & n. 13 (D.C. Cir.) (stating this proposition and citing cases), *cert. denied*, 506 U.S. 932, *and cert. denied sub nom. Smith v. United States*, 506 U.S. 932 *and cert. denied sub nom. Palmer v. United States*, 506 U.S. 933 (1992).[15] Second, unlike the wide array of potential CCE predicate offenses, acting in concert with one group of five people is no more or less blameworthy than acting in concert with another group of five. *Id.* at 256-57. Thus, two of three reasons that lead us to conclude from its silence that Congress meant to require unanimity as to specific predicate offenses – historical precedent and

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[15] The CCE statute's requirement that the defendant act "in concert" with five or more other people, 21 U.S.C. § 848(c), is similar to conspiracy law's requirement that a defendant enter into an agreement with some number of co-conspirators. Thus, the identity of a conspiracy defendant's co-conspirators provides a useful historical analogue to the identity of the five CCE underlings.

possible constitutional problems – cause us to read congressional silence as to the five-person requirement quite differently.

3. Conclusion

In summary, we hold that the CCE statute requires unanimous agreement as to the identity of each of the three related offenses comprising the continuing series. Our interpretation is guided by constitutional concerns, traditions in criminal jurisprudence, and the rule of lenity. These background principles lead us to conclude that when a statute combines formerly distinct offenses into a single crime – offenses that may occur at different times and in different places – we should assume that Congress intended the formerly distinct offenses to retain their "offense" status with its attendant unanimity requirements. Asking Congress to speak clearly is especially important here, where the penalty for violation of the statute is quite severe, from between twenty years to life in jail. *See* 21 U.S.C. § 848(a). Because there is no evidence of congressional intent to the contrary, we hold that the CCE statute requires unanimity as to its predicate offenses.

In making this decision, we do not hamper Congress's ability to enact innovative statutes to deal with new kinds of crime. Congress may alter unanimity requirements by statute if it makes its intention clear.[16]

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[16] As our holding is based on statutory interpretation, we do not reach the question whether the CCE statute would be unconstitutional absent a unanimity requirement. We leave that decision for another day.

Furthermore, as this case illustrates, *see infra*, unanimity as to predicate offenses is hardly an onerous burden.

III. Harmless Error

Because there is a "reasonable likelihood," *Estelle v. McGuire*, 112 S.Ct. 475, 482 (1991); *Boyde v. California*, 494 U.S. 370, 380 (1990), that the jury interpreted the district court's general unanimity instruction to require agreement only that *some* three predicate violations occurred and not that the same violations occurred, the district court's failure to give Edmonds's proposed specific unanimity instruction was error. This error implicates Edmonds's Sixth Amendment right to a unanimous verdict in a federal criminal trial.[17]

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[17] Language in the Schad plurality opinion arguably casts some doubt on whether the Sixth Amendment is implicated in jury verdict specificity problems. *See Schad*, 501 U.S. at 634 n. 5, (plurality opinion) (criticizing the Fifth Circuit for grounding the right to jury consensus on a single course of action on the Sixth Amendment rather than the Due Process Clause). However, read as a whole, we think that the Schad plurality's emphasis on the Due Process Clause does not mean that the Sixth Amendment is irrelevant here. Rather, we conclude that the Sixth Amendment does require unanimity, in federal criminal trials, on all elements of the offense. However, because what constitutes an "element" is purely a matter of legislative intent, the Sixth Amendment places no limit on the legislature's power to make alternative facts "means" not subject to a unanimity requirement. The limit on the legislature's definitional power, then, comes from the Due Process Clause. *See* Miller, *supra*, at 2284. We will not engage Judge Alito's alternative view that only the Sixth Amendment is relevant here. As the *Schad* plurality pointed out, "this difference in characterization . . . is immaterial to the problem of how to go about deciding what level of verdict specificity is

However, most constitutional errors are subject to the harmless error analysis of *Chapman v. California*, 386 U.S. 18 (1967). *See Rose v. Clark*, 478 U.S. 570, 578-79 (1986) ("[W]hile there are some errors to which Chapman does not apply, they are the exception and not the rule.").

Edmonds argues, and the original panel held, that *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993), precludes us from engaging in harmless error analysis. In *Sullivan*, a unanimous Supreme Court held that a constitutionally deficient reasonable doubt instruction is not subject to harmless error analysis. The Court reasoned that a verdict of guilty beyond a reasonable doubt is a necessary predicate of *Chapman's* harmless error inquiry:

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constitutionally necessary." *Schad*, 501 U.S. at 634 n. 5 (plurality opinion). However, we reject the applicability of Judge Alito's constitutional test. Judge Alito asserts that a legislative definition is unconstitutional only if it "contain[s] a combination of elements having no rational basis other than" an attempt to create room for factual disagreement underlying a conviction. While this framing of the issue represents an interesting way of balancing legislative deference with constitutional concerns, it is without support. Judge Alito asserts that the problematic hypotheticals discussed in *Schad* – (1) a crime permitting alternative findings of "embezzlement, reckless driving, murder, burglary, tax evasion, or littering," *Schad*, 501 U.S. at 633, (plurality opinion); and (2) "a felony consisting of either robbery or failure to file a tax return," *id.* at 650, (Scalia, J., concurring in the judgment) – have no rational basis other than "the circumvention of otherwise applicable jury-unanimity requirements." Although this may be a true descriptive claim, it does not justify displacing the constitutional tests explicitly stated by the *Schad* plurality (history, wide practice, and moral equivalence) and Justice Scalia (history) with a novel "rational combination of elements" test.

> [*Chapman's*] inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.
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> . . . . There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

113 S.Ct. at 2081-82 (citations omitted).[18] Edmonds asserts, and the panel agreed, that the jury instruction in

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[18] In addition, the Court stated that "[a]nother mode of analysis leads to the same conclusion," and held that the unconstitutional reasonable doubt instruction was a "structural defect[ ] in the constitution of the trial mechanism" not subject to harmless error analysis. *Id.* at 2802-83 (quoting *Arizona v. Fulminante*, 499 U.S. 279 (1991) (opinion of Rehnquist, C.J., for

this case allowed the jury to return a non-unanimous verdict on an element of the offense, and thus there is no actual jury finding of guilty upon which harmless error analysis may operate.

Edmonds and the panel are correct in a sense. Just as the Sixth Amendment precludes the court from affirming on the ground that the jury *would* have found the defendant guilty beyond a reasonable doubt had it been properly instructed, we cannot affirm a non-unanimous verdict simply because the evidence is so overwhelming that the jury surely would have been unanimous had it been properly instructed on unanimity.

Affirmance here, however, does not require making this speculative leap. Unlike the complete undermining of the verdict that occurred in *Sullivan*, this case involves error affecting only one of many findings made by the jury. The Supreme Court has held that similar errors – jury instructions that erroneously contain a mandatory presumption or misdescribe an element of the offense – may be harmless if the remaining unaffected jury findings are "functionally equivalent to finding" the lacking element. *Carella v. California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in judgment); *see also Yates v. Evatt*, 500 U.S. 391 (1991) (instruction containing an erroneous presumption); *Carella v. California*, 491 U.S. 263 (1989) (same); *Rose v. Clark*, 478 U.S. 570 (1986) (same); *Pope v. Illinois*, 481 U.S. 497 (1987) (instruction misstating an element of the offense).

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the Court)) (internal quotations omitted); *see also Sullivan*, 112 S.Ct. at 2083-84 (Rehnquist, C.J., concurring) (applying the *Fulminante* analysis).

Even though such errors impermissibly deprive the jury of its fact-finding function,[19] the resulting verdicts may be salvageable. Specifically, if other facts found by the jury are "so closely related" to the fact tainted by erroneous instructions "that no rational jury could find those facts without also finding [the former] fact, making those findings is functionally equivalent to finding" the lacking element. *Carella*, 491 U.S. at 271 (Scalia, J., concurring in the judgment); *see also Rose v. Clark*, 478 U.S. 570, 580-81 (1986) ("When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. In that event . . . [,] the jury has found, in *Winship's* words, 'every fact necessary' to establish every element of the offense beyond a reasonable doubt.") (citations omitted); *Carella*, 491 U.S. at 266 (quoting this passage from *Rose* with approval); *Pope*, 481 U.S. at 503 (same).

Sullivan itself distinguishes this line of cases from the fundamental flaw of misdescribing the burden of proof.

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[19] *See Carella*, 491 U.S. at 265 ("Such directions subvert the presumption of innocence accorded to accused persons and also invade the truth-finding task assigned to juries in criminal cases."); *id* at 268 (Scalia, J., concurring in the judgment) ("The Court has disapproved the use of mandatory conclusive presumptions not merely because it conflict[s] with the overriding presumption of innocence . . . , but also because it invade[s] [the] fact-finding function which in a criminal case the law assigns solely to the jury.") (citations and internal quotations omitted) (alterations in original).

In the latter case, the error "vitiates *all* the jury's findings." *Sullivan*, 113 S. Ct. at 2082 (emphasis in original). Absent "the essential connection to a 'beyond-a-reasonable-doubt' factual finding . . . a reviewing court can only engage in pure speculation." *Id.* at 2082 (citations omitted).

In this case it is unnecessary to speculate on what the jury's verdict would have been absent the erroneous instruction: the jury made proper unanimous findings of other facts which are "functionally equivalent" to finding that three specific predicate offenses were related to each other. Adhering to the assumption that jurors follow the instructions they are given, *see Richardson v. Marsh*, 481 U.S. 200, 211 (1987), we know that the jury unanimously found that Edmonds committed every CCE predicate offense alleged, and that Edmonds committed some three *related* predicate offenses.

The only finding for which unanimity is potentially lacking is that the same three predicate offenses are related to each other. However, the evidence introduced at trial to show that Edmonds committed each of the predicate offenses established that Edmonds used the same packers and mode of distribution throughout. *See Edmonds*, 52 F.3d at 1243. Edmonds did not argue to the jury – and has not argued since – that any of the predicate offenses were unrelated to the others.[20] Thus, the facts

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[20] Edmonds suggests in his answer to the government's petition for rehearing that it would have been improper to dispute relatedness in the absence of his requested specific unanimity instruction. We reject this argument because the jury was properly instructed that it must find three *related* offenses to

necessarily found by the jury to convict on the predicate offenses show conclusively that all of the predicate offenses are related to each other.

In these circumstances, no rational jury could unanimously find Edmonds guilty of the predicate offenses without unanimously finding that the offenses were related to each other. *See Ianniello v. United States*, 10 F.3d 59, 64 (2d Cir. 1993) (holding that a failure to instruct the jury that a RICO conviction requires a relationship between predicate offenses was harmless because the evidence which the jury must have believed to convict on every alleged predicate act conclusively established their relatedness); *United States v. Maloney*, 71 F.3d 645, 658 (7th Cir. 1995) (holding harmless court's erroneously instructing the jury that it could convict for obstruction of justice under 18 U.S.C. § 1503 without finding that an official proceeding was pending because the jury's finding that the defendant attempted to obstruct justice "is so closely related to the ultimate and unrebutted fact of the existence of a pending grand jury proceeding"); *United States v. Parmelee*, 42 F.3d 387, 393 (7th Cir. 1994) (holding that a failure to instruct the jury on an essential element of 8 U.S.C. § 1324(a)(1)(B) was harmless because unrebutted evidence meant that no rational jury could have convicted without finding the missing element), *cert. denied sub nom. Brozek-Lukaszuk v. United States*, 116 S. Ct. 63, *and cert. denied sub nom. Sobiecki v. United States*, 116 S. Ct. 63 (1995).

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convict under the CCE statute. Edmonds thus had ample incentive to contest relatedness.

Judge Stapleton takes issue with our understanding of the term "functionally equivalent" findings. While he does not say so explicitly, he seems to read *Rose v. Clark* to allow harmless error analysis only when untainted findings, considered without reference to the evidence supporting the findings, are logically equivalent to the missing element. Otherwise, he argues, the Court engages in impermissible speculation about what a properly instructed jury *would* have decided.

We acknowledge that the Supreme Court has not clearly defined "functionally equivalent" findings, and thus that there is some room for disagreement about the meaning of the term. Nevertheless, Judge Stapleton's position lies outside of the leeway left by the Supreme Court's pronouncements in this area. More importantly, his rule, if adopted, would frustrate the purpose of harmless error analysis – to distinguish immaterial errors from those affecting the trial's truth-finding function.

Judge Stapleton argues that in *Rose* the missing element was "necessarily inferred" from fact findings in that case, while here we impermissibly establish the missing element from "the strength of the trial evidence." We disagree. Both the *Rose* Court and this Court allowed the missing element to be found by looking at the jury's untainted findings *in light of the evidence supporting those findings.* In *Rose,* the trial court impermissibly instructed the jury to presume malice from certain predicate facts:

> All homicides are presumed to be malicious in the absence of evidence which would rebut the implied presumption. Thus, if the State has proven beyond a reasonable . . . doubt that a

> killing has occurred, then it is presumed that the killing was done maliciously.

Rose, 478 U.S. at 574. Given this instruction, the jury need only have found that a killing had occurred to establish the element of malice. But malice does not necessarily follow from the fact of a killing. Therefore, the established predicate fact bore no logical relationship to the missing element. In Judge Stapleton's terms, the fact that a killing has occurred is "as consistent" with the nonexistence of malice as it is with the existence of malice.

Nevertheless, the Supreme Court remanded for application of harmless error analysis. The Court stated:

> When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury.

Id. at 580-81. The Court was explicit that this inquiry would consider the evidence introduced at trial. In particular, it noted that "[t]he parties disagree on the scope of the evidence that must be assessed" on remand. *Id.* at 584 n.13; *see also id.* at 583 (making several references to *Chapman*'s requirement that the entire record be reviewed).[21] In giving directions for remand, the Court gave the following example:

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[21] Although Justice Scalia's concurrence in *Carella* criticized a broad review of the record in erroneous presumption cases, he has not suggested that it is improper to examine the jury's findings in light of evidence in the record necessary to establish those findings. Furthermore, Justice Scalia's view of the impact

> [I]t would defy common sense to conclude that an execution-style killing or a violent torture-murder was committed unintentionally. It follows that no rational jury would need to rely on an erroneous presumption instruction to find malice in such cases.

Id. at 581 n.10. Presumably, in the example described by the Court, the jury would not make findings as to the existence of "an execution-style killing or a violent torture-murder." Rather, such facts could only be shown by the evidence supporting the jury's finding that a homicide had occurred.

Our reading of the functional equivalence test – which allows inquiry into evidence necessary to support the jury's findings – is faithful both to the erroneous presumption cases and to *Sullivan*. Following the erroneous presumption cases, we examine the evidence in the record. However, our analysis follows *Sullivan*'s admonition not to speculate on what the jury would have found had it been correctly instructed. By examining the evidence necessary to support the jury's findings, we are not *weighing* any evidence, as Judge Stapleton suggests, but simply using undisputed evidence to give content to the jury's untainted findings.

Furthermore, our analysis furthers the purpose of harmless error analysis:

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of record evidence has not carried a majority of the Court. Rather, the Court has stated that harmless error analysis in erroneous presumption cases includes a review of the record. *See Yates*, 500 U.S. at 405-06; *Rose*, 478 U.S. at 583-84.

> The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Rose, 478 U.S. at 577 (citations omitted). In this case, the jury was instructed that, to convict, it had to find three related predicate offenses and that it had to unanimously find that every predicate offense occurred. All of the evidence establishing the predicate offenses showed that they were related. Importantly, Edmonds never even suggested that the offenses were unrelated, and *nothing* in the trial record suggests such a conclusion. In such a case, it requires no speculation to see that the error *did not* affect the verdict.[22]

Accordingly, we hold that the error was harmless beyond a reasonable doubt, *Chapman*, 386 U.S. at 24. The judgment of the district court will therefore be affirmed.

STAPLETON, J., *Concurring in Part and Dissenting in Part:*

I join in parts I and II of the court's opinion. I am unable to join part III.

The court finds that the district court's refusal to require unanimity was harmless error. This is justified, it

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[22] While Judge Greenberg joins in Judge Garth's opinion that the charge was correct, if he concluded that the charge was erroneous he would join in Part III of this opinion with respect to harmless error.

maintains, because the evidence concerning the nine narcotics violations which the jury found to have occurred could lead a rational jury to no conclusion other than that all were related. While this view has undeniable surface appeal, it is irreconcilably at odds with the teaching of *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Because of *Sullivan*, I would reverse and remand for a new trial on the CCE count.

A judge cannot, consistent with the Sixth Amendment right to a jury trial, direct a verdict for the prosecution no matter how overwhelming the evidence of guilt may be. This Sixth Amendment right "includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.' " *Id.* at 277. Moreover, the due process clause requires that this finding of guilt be a finding beyond a reasonable doubt. As the Court held in *Sullivan*, this means that the jury must find each of the essential elements of crime charged beyond a reasonable doubt. If the court's instructions to the jury communicate a standard for the government's burden of proof less than the beyond a reasonable doubt one, there can be "no jury verdict of guilty-beyond-a-reasonable doubt." If there is no such verdict, "[t]here is no *object*, so to speak, upon which harmless-error scrutiny can operate," *id.* at 280, and the defect cannot be cured by a judge's finding that "in a trial . . . without the error, a guilty verdict would surely have been rendered." *Id.* at 279. As my colleagues purport to recognize, "to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." *Id.*

The Sixth Amendment right to a jury trial includes the right to a unanimous jury agreement on each element of the offense charged, as well as an agreement on each such element beyond a reasonable doubt. *United States v. Beros*, 833 F.2d 455 (3d Cir. 1987). When this fundamental principle is added to the holding in *Sullivan*, it follows that the constitutionally required jury verdict is missing when the jury is not instructed that its verdict on each element of the offense must be unanimous. In such a case, "[t]here is no *object*, so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a [unanimous] jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual [unanimous] finding beyond a reasonable doubt *would surely not have been different* absent the constitutional error." *Sullivan* at 280.

This appellate court has determined today only that, given the evidence at trial, a jury properly charged would surely have unanimously agreed beyond a reasonable doubt that all of Edmonds' narcotics violations were related to one another. Under *Sullivan*, this is not a sufficient basis for affirming his CCE conviction.

The court distinguishes *Sullivan* on the ground that Edmonds' case is more like a line of mandatory presumption cases which the Supreme Court distinguished in *Sullivan*. *Id.* at 280-81. In cases like *Rose v. Clark*, 478 U.S. 570 (1986) and *Carella v. California*, 491 U.S. 263 (1989), the Court indicated that harmless error analysis is permissible in some cases where the jury has been instructed to apply mandatory presumptions that unconstitutionally relieved the state of its burden of proving all elements of the offense beyond a reasonable doubt. As the Court

explained in *Sullivan*, the Sixth Amendment right to a jury trial is not violated by a harmless error analysis in a mandatory presumption case if the predicate facts that the jury had to find before the presumption was triggered were "so closely related to the ultimate fact to be presumed that no rational jury could find those [predicate] facts without also finding that ultimate fact, making those findings [the] functional equivalent [of] the element required to be presumed." *Sullivan* at 281 (quoting from *Carella*, 491 U.S. at 271).

This case is not like *Rose* and *Carella*, however, and is indistinguishable from *Sullivan*. In *Rose* and *Carella*, the court could point to an actual finding made by the jury that was the functional equivalent of the element that the jury was required to find in order to support a guilty verdict. In this case, the court has not, and cannot, point to such a jury finding.

In *Rose*, for example, the jury was instructed in such a manner that the court knew the jury had found either the malice required for a murder conviction or predicate acts on the part of the defendant from which malice was necessarily inferred. As the Court in *Rose* noted, "[w]hen a jury is instructed to presume malice from predicate facts, it must still find the existence of those facts beyond a reasonable doubt," 478 U.S. at 580, and when that finding is the functional equivalent of the element required, there is an "*object*, so to speak, upon which harmless error scrutiny can operate." *Sullivan* at 280. In none of the mandatory presumption cases where the Supreme Court has approved harmless error analysis has the Court relied solely on the strength of the trial evidence.

In Edmonds' case, the only unanimous jury finding to which this court can point is a finding that Edmonds committed nine narcotics felonies. That finding is not the functional equivalent of a finding that those felonies were related. It is as consistent with those felonies being unrelated as it is with their being related. My colleagues have not concluded that relatedness necessarily follows from a fact the jury found; they have, rather, concluded that relatedness necessarily follows from the evidence tendered by the government at trial.[23] Their conclusion does not alter the critical fact under *Sullivan* – there is no

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[23] This critical distinction was emphasized by Justice Scalia, writing for four justices, in *Carella:*

> [T]he harmless error analysis applicable in assessing a mandatory conclusive presumption in [sic] wholly unlike the typical form of such analysis. In the usual case the harmlessness determination requires consideration of "the trial record as a whole" in order to decide whether the fact supported by improperly admitted evidence was in any event overwhelmingly established by other evidence.

491 U.S. at 267 (Scalia, J., concurring) (citations omitted). In contrast, Justice Scalia explained, the type of harmless error analysis applied in mandatory presumption cases seeks to determine whether there are jury findings beyond a reasonable doubt that are "functionally equivalent" to the missing element. The Court adopted Justice Scalia's analysis in *Sullivan*, and to the extent this distinction is inconsistent with the terms of the remand in *Rose*, *Sullivan*, not *Rose*, is currently the law of the land.

unanimous jury verdict "upon which harmless-error scrutiny can operate." *Id. United States v. Edmonds*, No. 93-1890

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

ALITO, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the court that the defendant's conviction should be affirmed, but I cannot accept the conclusion that the trial judge erred in refusing to instruct the members of the jury that they were required to agree unanimously with respect to the particular offenses that made up the "continuing series" of violations that were necessary for the defendant's conviction under the Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. § 848. Unlike the majority, I am convinced that Congress had no intention of imposing such a requirement when it enacted the CCE statute. I also conclude that such an instruction is not constitutionally required.

For these reasons, I concur in the judgment, but I join only part III of the court's opinion, which discusses harmless error. I approve this part of the court's opinion because, assuming for the sake of argument that the trial judge erred, I agree with the court that the error was harmless. I also join Judge Garth's opinion, but I write separately to explain in somewhat different terms why I disagree with the court's analysis of the jury-unanimity issue.

I.

I will first address the majority's statutory interpretation argument, i.e., its argument that Congress meant to include as part of the CCE statute a special jury-unanimity requirement that is independent of that contained in Fed. R. Cr. P. 31(a) (which simply requires a unanimous "verdict") and of constitutional requirements (which I discuss in Part II of this opinion). I think that the majority's interpretation of the CCE statute is wrong because it has no support in the language or legislative history of the CCE statute and because Congress has not followed the practice of including special jury-unanimity requirements as a part of criminal statutes (other than a few recent statutes setting out capital sentencing procedures.)[1]

A. The pertinent part of the CCE statute, 21 U.S.C. § 848(c), provides as follows:

> For purposes of subsection (a) of this section [which sets out penalties], a person is engaged in a continuing criminal enterprise if –
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> (A) which are undertaken by such person in concert with five or more other

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[1] *See* 18 U.S.C. § 3593; 21 U.S.C. § 848(k). I discuss 21 U.S.C. § 848(k) in footnote 2, *infra*.

> persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

There is nothing in this language or any other portion of the CCE statute that even hints that Congress intended to require jury unanimity with respect to the particular offenses needed to satisfy 21 U.S.C. § 848(c)(2) – and the majority does not contend otherwise. See Maj. Op. at 815. Indeed, the majority does not identify any statutory language that could serve as a reference point for its interpretation. Thus, even if there were extra-textual support for the proposition that Congress intended to impose a special jury-unanimity requirement in CCE cases, the majority's interpretation would run into difficulty, for as the Supreme Court has noted, " 'courts have no authority to enforce [a] princip[e] gleaned solely from the legislative history that has no statutory reference point.' " *Shannon v. United States*, 114 S.Ct. 2419, 2426 (1994) (citation omitted); *accord United States v. Fisher*, 10 F.3d 115, 120 (3rd Cir. 1993).[2]

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[2] It is worth noting that another portion of the CCE statute, 21 U.S.C. § 848(k), expressly requires jury unanimity with respect to a different finding. In 1988, death penalty provisions were added to the CCE statute. *See* Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 7001, 100 Stat. 4387. Under one of these new provisions, 21 U.S.C. § 848(k), a death sentence may be imposed only if aggravating factors are found to exist, and this provision expressly provides that "[a] finding with respect to any aggravating factor must be unanimous." While this provision was enacted well after the portion of the statute, 21

B. Finding no support for a special jury-unanimity requirement in the language of § 848(c), I turn to the legislative history of that provision, and again I find no support. As the majority states, neither the parties nor the majority itself has unearthed any indication in the legislative history that Congress intended to adopt such a special requirement. See Maj. Op. at 818. Thus, the two sources on which we most frequently rely in interpreting statutes, the statutory language and the legislative history, provide no basis for holding that § 848(c) contains a special jury-unanimity requirement – or even for concluding that there is any ambiguity on this point.

C. If this is not enough to refute the majority's interpretation, any remaining doubt must vanish when it is noted that Congress has not customarily included special jury-unanimity requirements in federal criminal statutes (other than the few I mentioned earlier that concern capital sentencing procedures). Indeed, I have not found any federal criminal statutes outside the field of capital sentencing that contain special unanimity requirements. If I have overlooked any, I hope that my colleagues in the majority will call them to my attention. But if I am right

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U.S.C. § 848(c), with which we are now concerned, the presence of an express jury-unanimity requirement in another subsection of the CCE statute weighs against the proposition that Congress, in enacting § 848(c), intended to impose an analogous requirement but either felt that it was unnecessary or neglected to insert any statutory language manifesting such an intent. The express jury unanimity requirement in 21 U.S.C. § 848(k) "shows that Congress knew how to draft [such a requirement] when it wanted to." *City of Chicago v. Environmental Defense Fund*, 114 S.Ct. 1588, 1593 (1994).

that Congress, as a uniform or general practice, has not adopted such special unanimity requirements, that practice seems to me to be telling. With no congressional custom of adopting such special unanimity requirements and no hint in the statutory language or legislative history that Congress meant to break new ground and impose such a requirement under § 848(c), I think that the majority's interpretation can confidently be rejected.

D. The majority claims that its interpretation of § 848(c) is supported by two canons of construction – the rule of lenity and the rule that an ambiguous statute should be interpreted where possible to avoid " 'grave and doubtful constitutional questions.' " Maj. Op. 819 (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366 (1909)). Neither of these canons, however, is applicable here. Both canons may properly be invoked only when the statute in question is legitimately ambiguous on the point at issue. These canons are, after all, tools for identifying, not overriding, congressional intent. As the Supreme Court recently noted, the rule of lenity "applies only if, 'after seizing everything from which aid can be derived,' we can make 'no more than a guess as to what Congress intended.' " *Reno v. Koray*, 115 S.Ct. 2021, 2029 (1995) (citation omitted); *See also United States v. Turcks*, 41 F.3d 893, 901 (3d Cir. 1994) (rule of lenity "operates only after it is determined that a criminal statute is ambiguous, not at the beginning of the process of construction, as an overriding consideration of being lenient to wrongdoers") (citation and internal quotations omitted); *United States v. Lanier*, 73 F.3d 1380, 1390 (6th Cir. 1996) (when applying the rule of lenity courts should not go to extreme lengths to

characterize criminal statutes as ambiguous when they can be read as relatively well-defined); *United States v. Valencia-Andrade*, 72 F.3d 770, 774 (9th Cir. 1996) (rule of lenity serves as aid for resolving ambiguity; it is not used to beget one). Likewise, "resort to an alternative construction to avoid deciding a constitutional question is appropriate only when such a course is 'fairly possible' or when the statue provides a 'fair alternative' construction." *Swain v. Pressley*, 430 U.S. 372, 378 n.11 (1977); *See also Friedrich v. United States*, 974 F.2d 409, 418-19 (3d Cir. 1992) ("Although a statute should be interpreted in a fashion that does not defeat the congressional purpose, . . . a court may not rewrite an unambiguous law") (citation omitted); *United States v. Salisbury*, 983 F.2d 1369, 1380 (6th Cir. 1993) (same); *Block v. Meese*, 793 F.2d 1303, 1310 (D.C. Cir. 1986) (Scalia, J.) (court may not read limitation into statute to avoid constitutional issue where no language in statute supports such interpretation). In this case, therefore, in the absence of any ambiguity as to whether Congress intended to include a special jury-unanimity requirement in § 848(c) – and for the reasons explained above, I see no such ambiguity – neither of the canons advances the majority's argument.

E. The only remaining source of authority invoked by the majority – and thus the sole pillar on which its entire statutory construction argument rests – is its understanding of "general historical tradition in criminal jurisprudence." Maj. Op. at 818. The majority states:

> Criminal trials have long ensured substantial jury agreement as to the facts establishing the offense. *This is because criminal statutes and the common law have generally defined crimes in terms*

> *of conduct (and accompanying mental state) that takes place in a single place at some specific time.* For example, murder statutes require that the defendant killed some other person, *an act occurring in some specified time and place.* Thus, when a jury delivers a general guilty verdict for such a crime, *we are confident that the jury agreed on most of the actions engaged in by the defendant.*

Id. (emphasis added).

The majority cites no authority for this reading of "general historical tradition in criminal jurisprudence," and I believe that the majority has overstated the principle that can legitimately be drawn from established criminal law precedents. To be sure, our law has traditionally demanded *a degree of specificity* in criminal prosecutions. Many rules of law, including those governing charging instruments[3] and bills of particulars,[4] work toward this end. But it is simply not true that the jury is always required to "agree[ ] on most of the actions engaged in by the defendant." Maj. Op. at 818. Nor is it true that the prosecution has invariably[5] been required to establish the

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[3] *See, e.g.*, Fed. R. Crim. P. 3 (a complaint sets out "the essential facts constituting the offense charged"); Fed. R. Crim. P. 7(c)(1) (the indictment or the information must set out "the essential facts constituting the offense charged.").

[4] *See* Fed. R. Crim. P. 7(f).

[5] I am aware that the majority states that "criminal statutes and the common law have *generally* defined crimes in terms of conduct (and accompanying mental state) that takes place in a single place at some specified time." Maj. Op. at 15 (emphasis added). If this rule is only "generally" true, however, then there must be instances in which it is not true. And if that is so, then I think it is incumbent upon the majority to explain when the rule

"specified time and place" where a charged offense occurred. *Id.*

In invoking "general historical tradition in criminal jurisprudence," the majority relies on the law of murder, but I believe that this body of law exposes the weakness of the majority's analysis. It is not correct, for example, that in a murder case the jury is required to "agree[ ] on most of the actions engaged in by the defendant." Maj. Op. at 818. Both the holding and the controlling opinions in *Schad v. Arizona*, 501 U.S. 624 (1991), illustrate this point.

Under the holding of *Schad*, which followed traditional practice (see *id.* at 640-42 (opinion of Souter, J.); *id.* at 648-50 (opinion of Scalia, J.)), a defendant may be convicted of first-degree murder even if some of the jurors base their guilty votes on the theory of felony-murder and others do not. Suppose, therefore, that the evidence in a murder case shows that the victim was driving in a remote area when he picked up the defendant, who was hitchhiking. Suppose that the victim's body is later found at the bottom of a cliff, that the medical examiner attributes death to a fall, that the defendant is later stopped while driving the victim's car and is found to have made many purchases using the victim's credit cards, and that forensic evidence ties the defendant to the victim's death. Suppose that six jurors conclude that the defendant deliberately pushed the victim off the cliff but that the remaining six jurors think

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does not apply and why the present case is not analogous to those in which this rule has not traditionally held true. The majority provides no such explanation.

that the victim accidentally fell to his death while attempting to flee from the defendant, who was robbing him. *Schad* teaches that the jury could find the defendant guilty of first-degree murder despite this important disagreement about the defendant's conduct.

Moreover, even if the jurors in a murder case all agree that the defendant intentionally killed the victim, both Justice Souter's and Justice Scalia's opinions in *Schad* make clear that the jurors need not agree on how the killing was accomplished. Justice Souter discussed *Andersen v. United States*, 170 U.S. 481 (1898), in which the Court upheld a murder conviction despite the fact that the indictment did not specify whether the death was caused by shooting or drowning. See 501 U.S. at 631. He then observed:

> We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission. . . . In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. . . . "

501 U.S. at 631-32 (citation omitted). Justice Scalia made the same point by means of a hypothetical. He wrote:

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because six jurors believe he strangled her to death (and caused the fire accidentally in his hasty escape), while six others believe he left her unconscious and set the fire to kill her.

501 U.S. at 650 (Scalia, J., concurring). Thus, it seems clear to me that the majority is wrong in saying that under traditional practice the jury in a murder case must always "agree[ ] on most of the actions engaged in by the defendant." Maj. Op. at 15.

Nor is the prosecution in a murder case always required to nail down the "specified time" or "specified . . . place" of the killing. To take another hypothetical case, suppose that a motorist is seen picking up a hitchhiker at one end of a state and that the hitchhiker is stopped many days later at the other end of the state driving the motorist's car. Suppose also that blood stains are found in the trunk, that the motorist's bullet-ridden body is discovered in a wooded area in another part of the state and that other evidence tying the hitchhiker to the crime is gathered. Would anybody suggest that the hitchhiker cannot be convicted unless the prosecution can prove specifically where and when the killing occurred?

In short, I do not think that it is possible to distill from "general historical tradition in criminal jurisprudence" the principle that the jury must always "agree[ ] on most of the actions engaged in by the defendant" or the principle that the prosecution must always prove that a charged offense occurred at a specific place or time. Instead, I think that our law has traditionally allowed some flexibility with respect to these matters, and thus I do not discern any traditional practice that provides appreciable support for the majority's interpretation of § 848(c). Certainly I do not see anything that can begin to overcome the lack of support for that interpretation in either the statutory language or the legislative history

and the absence of any congressional practice of imposing special jury-unanimity requirements as part of criminal statutes (other than the few I mentioned concerning capital sentencing). I therefore conclude that § 848(c) does not include any special jury-unanimity requirement.

II.

A. Because I reject the majority's statutory interpretation argument, I now turn to the question whether the Constitution obligated the trial judge in this case to instruct the members of the jury that they were required to reach unanimous agreement as to the particular offenses that made up the "continuing series" of violations that the defendant committed. Because this is a federal case, the only constitutional provision relevant to the issue of jury-unanimity, in my view, is the Sixth Amendment. Unlike the majority, I do not think that the Due Process Clause of the Fifth Amendment has any bearing on this issue.[6] See Maj. Op. 16-17.

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[6] My evaluation of the constitutional issue presented in this case would not change if I believed that the Due Process Clause of the Fifth Amendment were applicable here, but I do not think that it is.

The Sixth Amendment expressly guarantees the right to "trial by jury" and has been held to require a unanimous verdict in a federal criminal prosecution. *See* 10, *infra*. The Due Process Clause of the Fifth Amendment, of course, provides general protection for "liberty." "Where a particular amendment 'provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of "substantive due process" must be the guide for analyzing these claims.' " *Albright v. Oliver*, 114 S. Ct. 807, 813 (1994) (plurality) (quoting

B. The Sixth Amendment guarantees the right to a "trial by jury" in "all criminal prosecutions" in federal court. In *Johnson v. Louisiana*, 406 U.S. 356 (1972), and *Apodaca v. Oregon*, 406 U.S. 404 (1973), five Justices concluded that this right includes the right to a unanimous verdict. Justice Powell, who cast the deciding vote, reasoned as follows:

> [I]n amending the Constitution to guarantee the right to jury trial, the framers desired to preserve the jury safeguard as it was known to

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Graham v. Connor, 490 U.S. 386, 395 (1989). See also *id.* at 814 (Scalia, J., concurring); cf. *id.* at 817 (Ginsburg, J., concurring); *id.* (Kennedy, J., concurring); *id.* at 819-22 (Souter, J., concurring). Furthermore, the proposition that the Due Process Clause of the Fifth Amendment guarantees jury unanimity to a greater degree than does the Sixth Amendment seems to be inconsistent with the Supreme Court decisions holding that the Due Process Clause of the Fourteenth Amendment requires less jury unanimity than does the Sixth Amendment. *See Johnson v. Louisiana*, 406 U.S. 356 (1972); *Apodaca v. Oregon*, 406 U.S. 464 (1972).

In *Schad v. Arizona*, 501 U.S. 624 (1991), both the plurality opinion (see *id.* at 632-645) and Justice Scalia's concurrence (see *id.* at 649-652) discussed the constitutional restrictions imposed by the Due Process Clause of the Fourteenth Amendment because *Schad* was a state prosecution and the Sixth Amendment's implicit guarantee of a unanimous jury verdict is not applicable to the states. *Johnson v. Louisiana, supra; Apodaca v. Oregon, supra.* (This is my interpretation of the main thrust of footnote 5 of the *Schad* plurality opinion (501 U.S. at 634 n.5), which the majority discusses. *See* Maj. Op. 23 n.16.)

Some of the hypothetical statutes mentioned in the *Schad* plurality opinion and in Justice Scalia's concurrence could raise due process concerns unrelated to the question of jury unanimity. But insofar as jury unanimity is concerned, I see no justification for looking further than the Sixth Amendment.

> them at common law. At the time the Bill of Rights was adopted, unanimity had long been established as one of the attributes of a jury conviction at common law. It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a *unanimous jury verdict* to convict in a federal criminal trial.

Johnson v. Louisiana, 406 U.S. at 371 (Opinion of Powell, J.) (emphasis added) (footnote omitted).

As the highlighted portion of Justice Powell's opinion states, the common law and American practice at the time of the adoption of the Bill of Rights required a unanimous jury *verdict* – and, as far as I am aware, nothing more.[7] And subject to the proviso discussed in part II C of this opinion, I do not think that the Sixth Amendment goes any further. Thus, in my view, the Sixth Amendment requires that jurors be instructed regarding the elements of the offense with which the defendant is charged, and each juror, before deciding to vote "guilty," must decide in his or her own mind that every element was proven beyond a reasonable doubt. When the jurors vote, they must unanimously vote "guilty" in order for there to be a conviction. But assuming that they all vote "guilty," the Sixth Amendment unanimity requirement

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[7] *See, e.g.*, 4 W. Blackstone, *Commentaries* *376; Virginia Declaration of Rights, sec. 8 (protecting right "to a speedy trial by an impartial jury of [the] vicinage, without whose unanimous consent [a defendant] cannot be found guilty"); Delaware Declaration of Rights and Fundamental Rules, § 14 (protecting "right to a speedy Trial by an impartial Jury, without whose unanimous Consent [a defendant] ought not to be found Guilty"); Vt. Constitution of 1777 ch. 1, art. X (defendant cannot be found guilty without "the unanimous consent" of the "jury").

does not demand anything more. It does not require unanimity with respect to any subsidiary factual determinations that the individual jurors may have made in their own minds before casting their votes.

Under this approach, it is apparent that the breadth of the legislative definition of an offense substantially affects the degree of unanimity that is required. The more narrowly an offense is defined, the less room there will be for jurors to disagree on subsidiary factual matters. And the more broadly an offense is defined, the more room there will be for such disagreement. Suppose that State A defines first-degree murder as knowingly or purposely causing the death of another person. Suppose that State B defines first-degree murder as knowingly or purposely causing the death of another human being or causing the death of another human during the commission of a felony. The degree of unanimity required in State A is greater than in State B because in the latter a defendant could be convicted of first-degree murder even if some jurors think that he caused the death knowingly or purposely and others think he merely caused the death during the commission of a felony. But as *Schad* instructs, the scheme adopted by State B does not offend the Constitution.

C. I now come to the proviso to which I previously referred. Because of the relationship noted above between the breadth of the legislative definition of an offense and the degree of jury-unanimity needed to produce a unanimous verdict, Congress could circumvent the Sixth Amendment's guarantee of a unanimous verdict by lumping together incongruous elements under the rubric

of a single offense. I do not think that the Sixth Amendment would tolerate such a stratagem. If a new offense contained a combination of elements having no rational basis other than the evasion of the Sixth Amendment's jury unanimity requirement, that combination would be unconstitutional.

In *Schad*, both Justice Souter's and Justice Scalia's opinions pointed out that there could be extreme circumstances in which the Constitution would require jury-unanimity with respect to something other than the jury's general verdict of guilty. Justice Souter's opinion recognized that the meaning of the right to a unanimous verdict in a particular case depends on the legislative definition of the offense with which the defendant is charged, and he noted that this right could be undermined if a legislative body simply lumped together incongruous elements under the rubric of a single offense. 501 U.S. at 630-33. Concluding that the Constitution would not permit such a ploy, he observed that "nothing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of 'Crime' so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction." *Id.* at 633 (footnote omitted).

Justice Souter stressed, however, that considerable deference should be given to a legislative judgment concerning the definition of a criminal offense – or, in other words, to a legislative judgment that a particular combination of elements should be regarded as constituting a single rather than multiple offenses. *See id.* at 637-40. He

spoke of "a threshold presumption of legislative competence," the importance of "judicial restraint," and the need to avoid "judicial second-guessing." *Id.* at 637-38. Emphasizing that a legislature's " 'definition of the elements of [an] offense is usually dispositive,' " he nevertheless made clear that " 'there are obviously constitutional limits beyond which [a legislative body] may not go.' " *Id.* at 639 (citation omitted). In deciding whether these limits have been violated, he concluded, both "history and widely shared practices" are instructive. *Id.* at 640. He also observed that, when a statute sets out alternative elements, it is appropriate to consider whether they can reasonably be viewed as reflecting "notions of equivalent blameworthiness or culpability" or whether, as in his previous example of the offense of "Crime," no such view of the definition can reasonably be entertained. *Id.* at 643.

Justice Scalia's concurrence set out a similar but not identical analysis. He noted that "one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-to-6 verdict would seem contrary to due process." *Id.* at 650 (Scalia, J. concurring). In a somewhat similar vein, he later added that "[w]e would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." *Id.* at 651. Applying his view that the Due Process Clause of the Fourteenth Amendment does not proscribe deeply rooted historical practices, he concluded that Arizona's definition of murder, which represented the historical norm, did not violate due process. *Id.* at 651. Since *Schad* grew out of a state

prosecution, both these opinions discussed the requirements of the Due Process Clause of the Fourteenth Amendment, rather than the Sixth Amendment, but I believe that it is appropriate to translate their discussion into Sixth Amendment terms.

Under either Justice Souter's or Justice Scalia's analysis, Congress's definition of a "continuing criminal enterprise" does not, in my opinion, exceed the broad limits allowed for legislative judgment in determining whether particular elements should be combined to form a single offense. I readily acknowledge that the CCE statute, unlike the Arizona murder statute at issue in *Schad*, is not based on a long and widely accepted model but instead, as I discuss below, represents a innovative approach developed by Congress some 25 years ago. In light of these origins, the CCE statute cannot claim the protection from constitutional challenge that a more traditional criminal statute might enjoy, but this does not mean that the CCE statute is automatically suspect. As patterns of crime change, legislative bodies must have the freedom, within constitutional limits, to devise new ways of responding to those changes, including the creation of new crimes that are not closely modelled on any common law antecedents.

Although the CCE statute does not enjoy the protection of ancient lineage, I believe that both its structure and background support its constitutionality and comfortably distinguish it from the examples of impermissible statutes that were cited in the *Schad* plurality and concurring opinions. Justice Souter's example – an offense called "Crime" that would require proof that the defendant committed at least one act of "embezzlement,

reckless driving, murder, burglary, tax evasion, or littering" (501 U.S. at 633 (opinion of Souter, J.)) – seems to represent a combination of elements having no rational basis other than the circumvention of otherwise applicable jury-unanimity requirements. No element other than proof of one of the predicate offense appears to be necessary for conviction, and the predicate offenses are widely dissimilar. It is hard to imagine what legitimate basis there could be for such a combination of elements.

The hypothetical laws discussed by Justice Scalia seem to me to have similar flaws. What legitimate basis could there be for creating a crime "consisting of either robbery or failure to file a tax return" or permitting a defendant to be prosecuted for the offense of assaulting "either X on Tuesday or Y on Wednesday"? See 501 U.S. at 651 (Scalia, J., concurring).

The CCE statute differs sharply from these monstrosities. For one thing, there are important structural differences. The CCE statute sets out several elements in addition to the commission of the predicate offenses that must be proven in every case. Specifically, it must be shown, not only that the defendant committed a "continuing series of violations," but that (a) he undertook this activity "in concert with five or more other persons," (b) that "with respect to [these persons] he occupie[d] a position of organizer, a supervisory position, or any other position of management," and (c) that he "obtain[ed] substantial income or resources" from this series of violations. 21 U.S.C. § 848(c). The presence of these additional elements supports the view that the CCE statute represents an effort to define a distinct type of criminal activity.

The background of the CCE statute fortifies this view. The CCE statute was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236. After study and consideration, Congress concluded that drug abuse was "approaching epidemic proportions," that existing federal drug laws were inadequate, and that new approaches were needed. H.R. Rep. 91-1444, 91st Cong., 2d Sess., at 6, *reprinted in* 1970 U.S. Cong. & Admin. News 4566, 4571-72. The CCE statute represented one such innovative approach. Drafted to address what Congress considered a rapidly growing problem, this statute departed significantly from common law models and prior drug laws. Much like the RICO statute, *see* 18 U.S.C. §§ 1961-64, which was passed at roughly the same time, the CCE statute created a new crime by reference to a criminal organization or "enterprise." In enacting both of these ground-breaking statutes, it was apparently Congress's judgment that a new organizational approach was necessary in order to mount an effective attack on criminal groups that were causing great societal damage.

To my mind, this background must be taken into account in considering whether Congress exceeded constitutional bounds by creating the offense set out in 21 U.S.C. § 848(c). This background shows, I believe, that Congress had a rational and legitimate basis for crafting the particular combination of elements required under 21 U.S.C. § 848(c)(2). Specifically, this background demonstrates that it was the judgment of Congress that a new type of criminal activity was growing in importance and that a new type of criminal statute, keyed to the organizational scope of that activity, was needed. This legislative

judgment, in my view, is entitled to substantial respect. See *Schad*, 501 U.S. at 637-39 (opinion of Souter, J.).

Based on the structure and background of the CCE statute, I am persuaded that the statute does not contravene the Sixth Amendment's jury unanimity requirement but instead constitutes a permissible of [sic] exercise of Congress's broad power to define the scope of federal criminal offenses.

III.

For these reasons, I do not think that the trial judge in this case erred in refusing to instruct the members of the jury that they were required to agree unanimously on the predicate offenses committed by the defendant. If the trial judge had erred, however, I think that the error would be harmless for the reasons explained in part III of the opinion of the court.

GARTH, Circuit Judge, *Concurring in Part and Dissenting in Part*, SLOVITER, Chief Judge, GREENBERG, NYGAARD, ALITO and ROTH, Cirucit Judges, Join in this Concurring and Dissenting Opinoin.

While I agree that Edmonds' conviction must be sustained, I cannot agree that any error was committed by the district court. Because there was no error, it is a needless exercise to address whether that error was harmless.

Congress has never required a unanimous finding for each and every component of the Continuing Criminal Enterprise ("CCE") statute, 21 U.S.C. § 848(c). Therefore, in my opinion, the jury was not required to unanimously

agree on which three predicate acts constituted the "continuing series of violations" for purposes of the CCE statute, as *Echeverri* required, and which the majority of the Court now reaffirms.

I.

In this case, we have been asked to decide whether the identities of the predicate acts constituting the "continuing series of violations" prong of the CCE statute are so essential to proof of the CCE offense that the identity of each predicate act must be agreed upon unanimously by the jury; or whether the identities of the predicate acts are merely alternative means of committing the same CCE offense or preliminary facts required to establish the offense, such that unanimity is not required under the Supreme Court's decision in *Schad v. Arizona*, 501 U.S. 624 (1991).

The plain reading and meaning of the CCE statute does not require the identification of the particular predicate acts as an element of the CCE offense. Therefore, the jury need not have unanimously agreed on the same three predicate acts constituting the "continuing series" in convicting Edmonds of CCE. Accordingly, the district court did not err in failing to give such a specific unanimity instruction.

A.

In order for the government to make out the offense of conducting a continuing criminal enterprise, as defined by 21 U.S.C. § 848(c), it must show that:

> (1) the defendant committed a drug-related felony, 21 U.S.C. 848(c)(1);
>
> (2) the felony was "a part of *a continuing series of violations*" of the drug laws; 21 U.S.C. § 848(c)(2) (emphasis added);
>
> (3) the defendant undertook that drug-related felony "in concert with five or more other persons with respect to whom [the defendant] occupied a position of organizer, a supervisory position, or any other position of management," 21 U.S.C. § 848(c)(A); and
>
> (4) the defendant obtained substantial income or resources from these violations. 21 U.S.C. § 848(c)(B).

The district court had instructed the jury that "[a] continuing series of violations requires proof beyond a reasonable doubt that three or more violations occurred and that they, those three or more, were related to each other." App. 577. The district court also instructed the jury that "[y]ou are asked to deliberate with a view towards reaching a unanimous decision with respect to each count and each defendant charged here in this indictment." App. 581. The only issue before us on appeal is whether the district court erred in failing to instruct the jury that in order to convict Edmonds of engaging in a CCE, it must unanimously agree as to which three predicate acts constituted the "continuing series of violations" under the CCE statute.

Nowhere in the language or legislative history of the CCE statute does Congress evince a concern regarding the particular nature or identity of the predicate acts constituting the "continuing series of violations." Aside

from requiring that the "violations" be drug-related offenses, Congress has not imposed limits on what predicate acts constitute a "violation." The courts, at liberty to define this statute, have generally held that "violations" refer broadly to offenses, including unindicted offenses, whether or not they led to convictions. *See United States v. Rosenthal*, 793 F.2d 1214, 1226-27 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *United States v. Markowski*, 772 F.2d 358, 361-62 (7th Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986). Congress has not even defined the number of predicate acts required to form a "series." Thus, while some courts of appeal have required three predicate acts, *see United States v. Echeverri*, 854 F.2d 638, 642 (3d Cir. 1988); *United States v. Rosenthal*, 793 F.2d 1214, 1226 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987), another court has required only two. *See United States v. Canino*, 949 F.2d 928, 947 (7th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

Indeed, the statute itself does not require that the violations be "related," although the courts have uniformly read such a "relatedness" requirement into the definition of "continuing series." *See e.g. United States v. Rodriguez Aguirre*, ___ F.3d ___, 1996 WL 8119 *4 n.3 (10th Cir. 1996).

B.

The broadness with which Congress defined a "continuing series of violations" indicates that the exact identities of the predicate offenses necessary for a jury to find a "continuing series" for purposes of the CCE statute are not essential facts constituting an element of the offense.

Rather, the predicate offenses are no more than alternative means of, or preliminary facts, establishing the element of "continuing series." In *Schad v. Arizona*, 501 U.S. 624, 633 (1991), the Supreme Court held that facts that constitute merely alternative means of, or preliminary facts to, proving a single offense need not receive the unanimous agreement of the jury.

In *Schad*, a plurality of the Supreme Court held that the jury was not required to unanimously agree on whether the defendant Schad had committed premeditated murder or felony-murder in order to convict him under the Arizona first-degree murder statute. That statute provided that first-degree murder was only one crime, regardless of whether it occurred as a premeditated murder or a felony murder. The Supreme Court stated that:

> Our cases reflect a long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed. . . . We have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictment were required to specify one alone. In these cases, as in litigation generally, "different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict."

Id. at 631-32 (quotation omitted). Thus the Court rejected requiring jury unanimity on the "mere means of satisfying a single element of an offense," noting that such a requirement would lead to "absurd results." *Id.* at 636 n.6.

The *Schad* Court recognized that there were due process limits to the state's authority to define what facts constitute merely alternative means of committing a single offense. The Court stated that:

> [N]othing in our history suggests that the Due Process Clause would permit a State to convict anyone under a charge of "Crime" so generic that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering, for example, would suffice for conviction.

Schad, 501 U.S. at 63. There comes a point, the Court recognized, when "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses." *Schad*, 501 U.S. at 633. In the case of the Arizona murder statute, the Court held that due process was not violated because the state legislature had determined that premeditated murder was "morally equivalent" to felony murder. *Id.* at 644.

In the present case, the CCE statute clearly provides for conviction for engaging in a CCE regardless of the identity, level of seriousness, or differing penalties of the predicate acts constituting the "continuing series of violations." Because any grouping of multiple related drug offenses will satisfy this element of the statute, and because different groupings of predicate acts do not

define separate crimes, the identities of the specific predicate acts constituting the "continuing series" do not rise to facts so "indispensable to proof of a given offense," *Schad*, 501 U.S. at 633, that they must be agreed to unanimously by the jury. If we were to hold otherwise, we would in effect be establishing a rule requiring jury unanimity as to every predicate fact underlying the second prong of the CCE statute. Indeed, the majority opinion has furnished us with no explanation as to how its analysis can result in a conclusion that Congress intended just this one prong of a four-prong statute to require jury unanimity as to the identity of the three predicate acts and not require jury unanimity as to the factual underpinnings of the other components of the CCE.

Certainly, the majority opinion has furnished us with no clue as to why just *this requirement* of the CCE statute ("continuing series of violations") must be distinguished from the other three requirements of the statute.

While the first CCE prong (commission of a drug-related felony) requires only a single determination, the other three CCE prongs cannot be satisfied by a single determination and they therefore potentially raise unanimity issues. If the majority's analysis is correct, then it would inexorably follow that all five or more individuals – the subject of the third CCE prong – must likewise be identified and agreed upon by each member of the jury. Yet we have held, and the majority apparently agrees with that holding, (Maj. Op. at 21-22), that this is not required. *See United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989) (unanimity on five or more supervised individuals not required).

Similarly, and just as illogically under the majority's analysis, with respect to the CCE requirement that a defendant must have derived "substantial income or resources" from his drug violations, it would appear that the majority would also require unanimity as to the factual findings and identities of such income or resources. Would the jury have to identify the cash, property, airplanes, automobiles (Mercedes, Lexus, BMW), yachts, etc. and agree unanimously on the particular resource which the defendant received?

Such a construction – singling out and selecting one of four statutory requirements and interpreting an unarticulated congressional intent requiring unanimity only with respect to that one prong of a four-prong statute – is not supported by any precedent, any logic, or any reason. Nor can the majority's unsupported argument, that such a construction is mandated, supply that authority. In sum, " 'there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.' " *Schad*, 501 U.S. at 632 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)).

C.

Not requiring specific unanimity on the predicate acts constituting the "continuing series of violations" is consistent with our holding in *United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989), where we held that there need not be unanimous agreement among the jury as to the identities of the five or more persons making up the group of

underlings supervised, organized, or managed by the defendant for purposes of the CCE statute.[1]

The majority attempts to distinguish *Jackson* by arguing that the five-person requirement, unlike the continuing series requirement, has a "historical analogue in the law of conspiracy, which generally has not required the jury to unanimously agree on the identity of the defendant's co-conspirators." (Maj. Op. at 22). The applicability of the law of conspiracy to substantive CCE offenses is open to question. Moreover, even if the law of conspiracy were applicable here, it is clear that the continuing series requirement enjoys as much of a "historical analogue" as does the five-person requirement. Notably, in the case of a multiple-object conspiracy, a jury need not unanimously agree as to which object of the various charged objects forms the basis for their conviction of a defendant for conspiracy. *See, e.g., United States v. Linn*, 31 F.3d 787, 991 (10th Cir. 1994); *United States v. Peral-Cota*, 1993 WL 68934, *4 (9th Cir. 1993).[2]

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[1] At least seven other circuits have not required unanimity with respect to the identity of the five underlings in the CCE statute. *See United States v. Jelinek*, 57 F.3d 655, 658 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 236 (1995); *United States v. Harris*, 959 F.2d 246 (D.C. Cir.), *cert. denied*, 506 U.S. 932 (1992); *United States v. Canino*, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992); *United States v. Moorman*, 944 F.2d 801 (11th Cir. 1991) (per curiam), *cert. denied*, 503 U.S. 1007 (1992); *United States v. English*, 925 F.2d 154, 159 (6th Cir.), *cert. denied*, 501 U.S. 1211 (1991); *United States v. Linn*, 889 F.2d 1369, 1374 (5th Cir. 1989), *cert. denied*, 498 U.S. 809 (1990); *United States v. Tarvers*, 833 F.2d 1068, 1074 (1st Cir. 1987).

[2] Indeed, as the Supreme Court has held, "[w]hen a jury returns a guilty verdict on an indictment charging several acts

The majority also argues that *Jackson* is distinguishable because "acting in concert with one group of five people is no more or less blameworthy than acting in concert with another group of five." (Maj. Op. at 22). However, as discussed *infra*, the CCE statute clearly provides that engaging in one group of related predicate acts is as equally blameworthy as engaging in another group of related predicate acts. Just as the exact identities of the five supervised individuals are preliminary factual findings or mere alternative means to proving a CCE offense, the exact identities of the predicate acts constituting the "continuing series of violations" are also preliminary factual findings or mere alternative means to proving a CCE offense and thus need not be the subject of jury unanimity. *See United States v. Anderson*, 39 F.3d 331, 350-51 (D.C. Cir. 1994) (holding that the district court's failure to instruct the jurors that they were required to agree unanimously on the particular predicate acts committed and the identities of the five individuals managed in order to convict the defendant for violation of the CCE statute was not plain error), *cert. denied*, 116 S. Ct. 542 (1995); *United States v. Canino*, 949 F.2d 928, 948 (7th Cir. 1991) (holding that juror unanimity was not required on the identities of the predicate offenses constituting the "continuing series" because "[t]he constitutional requirement of juror unanimity in federal criminal offenses is satisfied when

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in the conjunctive, . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Griffin v. United States*, 502 U.S. 46, 56-57 (1991) (quoting *Turner v. United States*, 396 U.S. 398, 420 (1970)).

each juror in a CCE trial is convinced beyond a reasonable doubt that a defendant charged under the CCE statute committed two predicate offenses."), *cert. denied*, 504 U.S. 910 (1992).[3]

D.

The district court's general unanimity instruction sufficiently ensured that the jury would unanimously agree that a "continuing series of violations," that is, three or more related drug offenses, occurred. Thus, I find that the district court committed no error when it did not provide a specific unanimity instruction.

II.

Today, the majority purports to "affirm" or "reaffirm" our decision in *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988). The majority, conceding that neither the language nor legislative history of the CCE statute requires specific unanimity, strains to justify its position by resorting to "background interpretive principles,"

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[3] *See also United States v. Kramer*, 955 F.2d 479, 486-87 (7th Cir. 1992) (rejecting defendants' contention that the jury should have been instructed that it must unanimously agree as to each of the two or more predicate offenses constituting the "continuing series" of CCE, where the court had given a general unanimity instruction), *cert. denied*, 506 U.S. 998 (1992); *United States v. Hernandez-Escarsega*, 886 F.2d 1560 (9th Cir. 1989) (specific unanimity instruction not required where the jury had convicted the defendant of two of the eleven predicate offenses alleged in the CCE count, and where there was "overwhelming" evidence at trial that the other charged predicate acts had occurred), *cert. denied*, 497 U.S. 1003 (1990).

including the "tradition in criminal jurisprudence," constitutional considerations, and the rule of lenity. In my view, these "background interpretive principles" cannot support the ambitious proposition for which they are invoked by the majority.

A.

First, the majority argues that under the "general historical tradition in criminal jurisprudence," "[c]riminal trials have long ensured substantial jury agreement as to the facts establishing the offense." (Maj. Op. at 15). In so arguing, the majority glosses over and fails to answer the central dilemma in the case: how we are to determine which facts require or do not require unanimous jury agreement.

Clearly, not all of the facts underlying a verdict require jury unanimity. *See Schad, supra.* In failing to define what "facts" require jury unanimity or not, the majority's argument does not supply a satisfactory, authoritative, or logical answer as to whether the identities of the three predicate acts constituting a "continuing series of violations" for purposes of CCE require jury unanimity.

B.

Next, the majority argues that "[t]here is a real possibility that the CCE statute would violate the Due Process Clause absent a specific unanimity requirement." (Maj.

Op. at 16-17). The majority, however, cannot find a principled way to argue that due process was violated in this case when it was not violated in *Schad*.

In *Schad*, the Supreme Court held that the Due Process Clause was not violated when the defendant was convicted of first-degree murder despite the lack of assurance that the jury unanimously agreed as to whether the defendant had committed premeditated murder or felony murder. The majority argues that this result was defensible in *Schad* only because premeditated murder and felony murder are of "equivalent blameworthiness or culpability" (Maj. Op. at 18 (quoting *Schad*, 501 U.S. at 643)); and that in the present case, the three predicate offenses may vary greatly in degrees of seriousness which would cause them to not be equivalently blameworthy.

This argument lacks any basis in logic. To the extent that the CCE statute allows conviction for the same offense based on any grouping of multiple related predicate acts, despite the fact that each act may carry very different penalties, this is a decision that has already been made by Congress. In other words, Congress has already determined that regardless of the exact identity or seriousness of the predicate acts constituting the "continuing series," a defendant is equally blameworthy so long as he has engaged in multiple related drug-related offenses. As the Supreme Court noted in *Schad*, " 'the . . . legislature's definition of the elements of the offense is usually dispositive.' " *Schad*, 501 U.S. at 639.

A legislature's definition of the elements of an [sic] crime does not offend constitutional strictures where such definition is supported by "history" and "shared

practice." *See Schad*, 501 U.S. at 640. As discussed earlier, Congress's decision not to require unanimity on the identities of the predicate acts for a CCE offense finds a historical analogue in the well established law that where an indictment alleges multiple acts charged in the conjunctive, the jury need only be given a general unanimity jury instruction, and a general guilty verdict suffices to convict the defendant. *See, e.g., United States v. Linn*, 31 F.3d 787, 991 (10th Cir. 1994); *United States v. Peral-Cota*, 1993 WL 68934, *4 (9th Cir. 1993).

Moreover, a specific unanimity instruction to the jury would do nothing to change the fact that a defendant could be convicted for CCE regardless of whether the jury found that he engaged in a series of first-time simple possession offenses or whether the jury found that he engaged in a series of more serious crimes such as distributing large quantities of drugs.[4]

Accordingly, because Congress has already determined that any "continuing series of [drug] violations," regardless of the identity or seriousness of those drug violations, is equally blameworthy for purposes of CCE, we defer to Congress's determination as the Court deferred to the Arizona legislature's intent in *Schad*. The majority's argument that the predicate acts making up

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[4] I raise this point not to "suggest[ ] that the equivalent blameworthiness test is a pointless exercise," (Maj. Op. at 19), but to highlight the fact that the majority's criticism of the CCE statute would not be cured by the specific unanimity instruction requested on the appeal before us. Indeed, the majority's "equal blameworthiness" argument does not provide support for a specific unanimity instruction, but instead stands as a challenge to the facial constitutionality of the CCE statute.

such a "continuing series" may vary in degrees of seriousness is irrelevant, and Edmonds' conviction for CCE, even if based on less than unanimous jury agreement as to which three predicate acts constituted the "series," does not violate due process.[5]

C.

Finally, the majority also argues that requiring specific unanimity is "counseled" by the rule of lenity.

First and foremost, the rule of lenity applies only when a statute is ambiguous and, in light of the traditional view that unanimity is required only as to the general verdict, the CCE statute cannot be deemed ambiguous.

Moreover, as the majority acknowledges, there is no authority for applying the rule of lenity to the issue posed in the present case. Nevertheless, the majority argues that the rule of lenity should apply here because it has been applied to the "conceptually analogous situation: whether a single criminal act constitutes one or more violations of a statute." (Maj. Op. at 19-20). I fail to see, however, how the issue of whether a single criminal act constitutes one or more violations of a statute is at all analogous to the present issue of whether the facts sought

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[5] The majority also notes for the first time in the harmless error section of its opinion, that the Sixth Amendment is also "implicated" by the district court's failure to give a specific unanimity instruction in this case. (Maj. Op. at 23). However, as the majority concedes, the present inquiry turns not on Sixth Amendment concerns but Due Process concerns. (Maj. Op. at 23 n.17).

to be proven at trial are or are not so essential to proof of an element of the offense such that jury unanimity is or is not required.

The majority also invokes a number of cases for the proposition that the rule of lenity requires fair warning as to the harshness of criminal penalties for a given offense. From there, the majority makes the tenuous connection that because procedural protections affect the likelihood that a penalty will be imposed, that "[a]t some point, differences in procedural protections become as significant as different penalties, and the need for fair warning just as critical." (Maj. Op. at 20-21).[6] This argument is forced and fails to persuade. The "procedural protections" at trial may affect the likelihood that a defendant will be convicted at trial (a jury question), but this is a separate issue from what penalties will be imposed (a statutory and/or judicial matter).

III.

Because Congress has not required specific unanimity with respect to any of the predicate factual findings underlying the CCE statute, and because there is no basis for our requiring unanimity as to the identities of the predicate acts when we do not require unanimity as to the identities of the five supervised individuals, or as to the identities of the defendant's income and resources; I would overrule *Echeverri*. Instead, I would hold that, absent Congressional intent requiring jury unanimity as

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[6] Presumably, the "procedural protection" that the majority has in mind is a specific unanimity instruction to the jury.

to the identity of predicate factual findings, a specific unanimity instruction on a statute's predicate findings is not required.

Because there was no error committed by the district court, I would not reach the issue of harmless error. Although I concur in the ultimate result reached by the majority in sustaining Edmonds' conviction, I respectfully dissent from the majority's holding that requires unanimity as to the identities of the predicate acts constituting the "continuing series" prong of the CCE statute.

A True Copy:
Teste:

Clerk of the United States Court
of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO.
	:	92-504
v.	:	
	:	
THEODORE E. EDMOND	:	
REINARD H. MOZELL,	:	
a/k/a "Reiney,"	:	

ORDER

AND NOW, this 22nd day of April, 1993, upon consideration of the defendants' motion to suppress fruits of electronic surveillance and the government's opposition thereto, it is hereby

ORDERED

the the [sic] defendants' motion is DENIED.

/s/ James T. Giles
HONORABLE
JAMES T. GILES
Judge, United States
District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff, v. THEODORE EDMONDS, et al, Defendants.	Criminal Action 92-504-01/05/06/11/16 Philadelphia, PA May 21, 1993 9:30 A.M.

TRANSCRIPT OF CRIMINAL JURY TRIAL
BEFORE THE HONORABLE JAMES T. GILES
UNITED STATES DISTRICT JUDGE

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Audio Operator:
DAVID T. HAYES

* * *

[p. 44] Court did in fact address the penalty issue when you instructed the jury that they should not be guided by sympathy, bias, prejudice, public opinion or the consequences to the participants and I don't know that you need to reemphasize it. As I understand it it's not necessary to reassert the requested instructions that the Court's already ruled on at this point.

THE COURT: I think you should . . .

MR. LA RENE: All right.

THE COURT: . . . if there's something I failed to cover.

MR. LA RENE: I had asked for some instructions that the Court specifically indicated it would not

give and didn't give them. For example, I asked the Court to instruct on the unanimity requirement under Count 2 both as to violations and as to participants and the Court just . . .

THE COURT: I . . .

MR. LA RENE: . . . held that it would not – it didn't think such instructions were proper. I didn't expect you to give them.

THE COURT: Your exception is noted.

MR. LA RENE: Thank you, sir. Sir, with respect to the telephone counts, the indictment charges that the use of the telephone was to facilitate the conspiracy charged in Count 1. I believe that the Court's instructions to the jury

* * *

[p. 138] think would lead them to disregard the other evidence [sic] – the other instructions regarding burden of proof.

MR. CHAMBERS: Your Honor, I'd just join in the objection.

MR. GELB: Your Honor, I would join in co-counsel's argument, if I may?

THE COURT: Anything from the Government?

MS. BALDASSANO: No, your Honor. The Government thinks that – it's the Government's position that your instructions to the jury were appropriate and proper under the Third Circuit precedent.

THE COURT: Gross proceeds in a drug case I find are all forfeitable because the net profit may be direct proceeds and the rest of it is indirect. And, it is related integrally to the totality of the drug transactions, whether as co-conspirators or through a continuing criminal enterprise where, in effect, every agent is an agent of the other for purposes of the drug transactions and the proceeds generated thereby.

I've read the Seventh Circuit case. I don't find that it is persuasive for a drug proceeds case.

MR. LA RENE: Very well.

THE COURT: Okay. And, as to the other objections, I find that the law is rather clear. All right. Your objections are noted.

MR. LA RENE: Very well, sir.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
V.
THEODORE EDMONDS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number:
2:92CR00504-1

(a.k.a. JAMES EDMOND, JOHN WILLIS LEWIS, MARK CRAIG BROWN, MARK CRAIG, JAMES CRAIG, CLARENCE EDMOND)

(Name of Defendant)

N.C. Delay La Rene
Defendant's Attorney

THE DEFENDANT:
[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to counts(s) _____ which (was) (were) accepted by the court.
[X] was found guilty on count(s) 1,2,4-13, & 28 after a plea of not guilty.

Title/ Sect	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC § 846	conspiracy to distribute cocaine and heroin	07/24/92	1
21 USC § 848	continuing criminal enterprise	07/24/92	2
21 USC § 841(a)(1)	distribution of cocaine and heroin aiding and abetting	07/24/92	4
§ 2	aiding and abetting		
21 USC § 841(a)(1)	distribution of cocaine and heroin	07/24/92	5

(offense text continued on page 1.01)

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 552-98-5489
Defendant's Date of Birth: 09/19.54

Defendant's Mailing Address:
PHILA. DETENTION CENTER

PHILA. PA

Defendant's Residence Address:
12851 WIDENER STREET

PACOMIA CA 91331

09/08/93
Date of Imposition of Judgment

/s/ James T. Giles
Signature of Judicial Officer

JAMES T. GILES
JUDGE USDC EDPA
Name & Title of Judicial Officer

9/10/93
Date

Title/ Sect	Nature of Offense	Date Offense Concluded	Count Number(s)
	(Offense text continued from page 1)		
§ 2	aiding and abetting		
21 USC § 841 (a) (1)	distribution of cocaine and heroin	07/24/92	6
§ 2	aiding and abetting		
18 USC § 1956 (a) (1) (A) (i)	money laundering	07/24/92	7
§ 2	aiding and abetting		
18 USC § 1956(a) (1) (A) (i)	money laundering	07/24/92	8
§ 2	aiding and abetting		
18 USC § 1956(A) (1) (A) (i)	money laundering	07/24/92	9
§ 2	aiding and abetting		
18 USC § 1956(a) (1) (A) (i)	money laundering	07/24/92	10
§ 2	aiding and abetting		

21 USC § 243(b)	unlawful use of communication facility	07/24/92	11
21 USC § 243(b)	unlawful use of communication facility	07/24/92	12
21 USC § 243(b)	unlawful use of communication facility	07/24/92	13
21 USC § 853	forfeiture act	07/24/92	28

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of life.

96 months on Count(s): 11,12, & 13
240 months on Count(s): 7,8,9, & 10
1000 months on Count(s): 1 this count is merged into count 2.
1000 months on Count(s): 2,4,5, & 6 all life terms

Count one is merged into count two, the defendant is sentenced on count two to life. All imprisonment counts are to run concurrently with each other.

[X] The court makes the following recommendations to the Bureau of Prisons:

Count 1 is merged into count 2, and the defendant is sentenced to life on count 2. All imprisonment counts are to run concurrently with each other.

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

[ ] at _____ am/pm on _____ .
[ ] As notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2:00 p.m. on _____ .
[ ] As notified by the United States Marshal.
[ ] As notified by the probation office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL
By _____
Deputy Marshal

_____

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 10 years.

10 years as to Count(s): 1 merged into count 2
10 years as to Count(s): 2,4-13

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this Judgment. The defendant shall comply with the following additional conditions:

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count	Assessment	Fine	Restitution
1	$ 50.00	$25,000.00	$.00
2	$ 50.00	$25,000.00	$.00
4	$ 50.00	$25,000.00	$.00
5	$ 50.00	$25,000.00	$.00
6	$ 50.00	$25,000.00	$.00
7	$ 50.00	$25,000.00	$.00
8	$ 50.00	$25,000.00	$.00
9	$ 50.00	$25,000.00	$.00
10	$ 50.00	$25,000.00	$.00
11	$ 50.00	$25,000.00	$.00
12	$ 50.00	$25,000.00	$.00
13	$ 50.00	$25,000.00	$.00
28	$ .00	$ .00	$.00
Totals:	$600.00	$25,000.00*	$.00

(*total printed is the amount entered and not the sum of the counts listed)

FINE

The fine includes any costs of incarceration and/or supervision.

[X] The court has determined that the defendant does not have the ability to pay interest in full.

It is ordered that:

[X] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column below. Restitution shall be paid to the following persons in the following amounts:

Name of Payee	Amount of Restitution	Priority Order of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) fine costs; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be paid as follows:

[X] in full immediately.
[ ] in full not later than _____ .
[ ] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if

incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $_____ over a period of _____ months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the above payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment schedule and any modifications to that schedule.

STATEMENT OF REASONS

[ ] The Court adopts the factual findings and guideline application in the resentence report.

OR

[X] The Court adopts the factual findings and guideline application in the presentence report except para 30 amended to reflect 1760 kilograms of cocaine.

Guideline Range Determined by the Court:

Total Offense Level: 43
Criminal History Category: ___
Imprisonment Range: life to ___ months and ___ months consecutive.
Supervised Release Range: 10 to ___ years
Fine Range: $25,000.00 to $38,000,000.00

[ ] Fine waived or imposed below the guideline range, because of inability to pay

Restitution: $_____

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons(s) [sic]:

OR

[ ] The sentence departs from the guideline range
[ ] upon motion of the government, as a result of defendant's substantial assistance.
[ ] for the following reason(s):

Filed April 18, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-1890, 93-1914, 93-1920, 93-1947

UNITED STATES OF AMERICA

v.

THEODORE EDMONDS,
Appellant in No. 93-1890

UNITED STATES OF AMERICA

v.

LORENZO DUNCAN, a/k/a TARIQ
Lorenzo Duncan,
Appellant in No. 93-1914

UNITED STATES OF AMERICA

v.

CARLTON LOVE,
Appellant in No. 93-1920

UNITED STATES OF AMERICA

v.

CORA LOVE,
Appellant in No. 93-1947

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. Action Nos. 92-cr-00504-1, 92-cr-00504-6,
92-cr-00504-5, 92-cr-00504-16)

Argued October 24, 1994

BEFORE: STAPLETON, HUTCHINSON and GARTH,
Circuit Judges

(Opinion Filed April 18, 1995)

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OPINION OF THE COURT

STAPLETON, *Circuit Judge:*

Theodore Edmonds, Lorenzo Duncan, Carlton Love, and Cora Love appeal from their convictions and sentencings after a jury trial on various drug-related charges. The jury found all four appellants guilty of distributing cocaine and heroin, in violation of 21 U.S.C. § 841(a)(1), and of conspiracy to distribute cocaine and heroin, in violation of 21 U.S.C. § 846. Three defendants, Edmonds, Duncan, and Carlton Love, were found guilty of knowingly and intentionally using a communication facility in committing, causing, and facilitating the conspiracy to distribute cocaine and heroin, in violation of 21 U.S.C. § 843(b). Edmonds also was convicted of money laundering under 18 U.S.C. § 1956, and of managing, supervising, and organizing a continuing criminal enterprise ("CCE"),

under 21 U.S.C. § 848. On top of those convictions, the jury returned a verdict of $27,000,000 for the government against Edmonds, $4,500,000 against Carlton Love, and $4,000,000 against Duncan under the criminal forfeiture statute, 21 U.S.C. § 853. These appeals have been consolidated.

The appellants raise numerous issues, three of which present close and important questions warranting this opinion. The first concerns Edmonds' conviction on the charge of managing, supervising, and organizing a continuing criminal enterprise in violation of 21 U.S.C. § 848. Following our decision in *United States v. Echeverri*, 854 F.2d 638 (3d Cir. 1988), we hold that the trial court committed reversible error when it refused to instruct the jury that it had to unanimously agree which of Edmonds' alleged drug violations constituted "the continuing series of violations" required for conviction on that count.

The second issue concerns the sentences imposed on Carlton Love and Cora Love. Those two appellants argue that the drug quantities attributed to them for sentencing purposes were not justified by the evidence presented at trial. We agree. An appropriate drug-weight estimate will lower Carlton Love's U.S. Sentencing Guideline offense level; accordingly, we will remand his case for resentencing. It is unclear whether an appropriate drug-weight estimate would change Cora Love's offense level, so we will remand her case for further findings and, if necessary, a reconsideration of her sentence.

The final issue involves the district court's admission into evidence of certain drug paraphernalia seized during the execution of a search warrant. Carlton Love claims

that the search warrant was issued on the basis of an affidavit containing information allegedly obtained in violation of his Fourth Amendment rights. We find no Fourth Amendment violation and accordingly cannot fault the challenged evidentiary ruling.

I.

This case involves a large conspiracy to distribute cocaine and heroin through the Federal Express system. The conspirators, for over a year, would ship drugs from the Los Angeles area via Federal Express to points in the East Coast and Midwest. Various members of the conspiracy then would distribute the drugs, collect money in return, and ship the money received back to California, again using Federal Express. Headed by Edmonds, the conspiracy sold more than 1500 kilograms of cocaine and more than 2 kilograms of heroin to distributors in Chester, Pennsylvania; Philadelphia, Pennsylvania; Wilmington, Delaware; Wilmington, North Carolina; Detroit, Michigan; New Orleans, Louisiana; Toledo, Ohio; and elsewhere.

Edmonds arranged the drug shipments from the Los Angeles area with the help of codefendant Reinard Mozell and one or two others. Tyria H. Ekwensi managed the distribution operation for the East Coast and the Detroit area. During the early part of the conspiracy, Edmonds would send shipments to Ekwensi's address in Mount Laurel, New Jersey. Ekwensi passed the drugs on to Duncan, her sole distributor at that time, who then sold the drugs on consignment. As the conspiracy progressed, Ekwensi also began to distribute the drugs to

Russell Freeman, Jr. and to Carlton Love. At one point, Edmonds started to send the shipments directly to addresses provided by both Duncan and Freeman, Jr., as well as Ekwensi.

During the early part of these operations, Ekwensi would secret monies received from selling the drugs on her person and personally deliver the money to Edmonds in California. Edmonds eventually changed that procedure and Ekwensi proceeded to send packages of money by Federal Express to various Edmonds-controlled Los Angeles-area addresses. Carlton Love, Duncan, and Freeman, Jr. assisted Ekwensi with preparing the money for shipment and delivering the boxes to Federal Express.

The scheme began to unravel when a Federal Express employee at the Philadelphia airport became suspicious of a package that had been presented for shipment to the Los Angeles area. He opened the package and discovered that it contained a large amount of currency. Shortly thereafter, the same Federal Express employee noticed a similar package. He alerted the Federal Express security department, which in turn alerted law enforcement authorities. The package was searched and found to contain approximately $200,000 in cash.

In the course of the next several months, the FBI checked Federal Express records and seized a number of Federal Express packages containing cash sent from the Philadelphia area to the Los Angeles area as well as a number of packages containing drugs sent from the Los Angeles area to the Philadelphia area. On May 29, 1992, the government secured the first of a series of wire and

electronic communications warrants on telephones subscribed to or used by subjects of the investigation. The wiretaps led to seizures and physical surveillance. This evidence, coupled with the ultimate cooperation of a number of the suspects of the investigation, led to the indictment of sixteen individuals, some from the Los Angeles area and others from the Philadelphia area. Ekwensi and Mozell testified for the government at trial.

The appellants were tried, convicted and sentenced in the U.S. District Court for the Eastern District of Pennsylvania. We have jurisdiction to hear these appeals under 28 U.S.C. § 1291.

II.

The jury found Edmonds guilty of managing, supervising, or organizing five or more persons in a continuing criminal enterprise, in violation of 21 U.S.C. § 848.[1]

---

[1] Section 848(a)(1) makes it a crime to engage in a "continuing criminal enterprise." Section 848(b) provides that a person engages in a "continuing criminal enterprise if –

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –
>
> > (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains substantial income or resources."

Edmonds gives two reasons why that conviction should be reversed. His first is that the government failed to meet the statute's "numerosity" requirement; that is, he contends that the government failed to prove that he managed, supervised, or organized five or more people in connection with the underlying drug felonies. Our examination of the record reveals that there in fact was sufficient evidence to support a finding that Edmonds managed, supervised, or organized five or more people in connection with the underlying drug felonies.

Edmonds' second reason for challenging his CCE conviction is more substantial. He contends that the trial court erroneously refused to instruct the jury that it had to unanimously agree which of the alleged violations constituted the "continuing series of violations" required for a conviction on the CCE charge. We agree that the trial court's refusal to give such an instruction requires a reversal of Edmonds' conviction on the CCE charge.

A.

To obtain a conviction under the continuing criminal enterprise statute, 21 U.S.C. § 848, the government must prove that the defendant, through his or her supervisory role over a criminal enterprise of five or more others, is criminally responsible for a "continuing series" of felony violations of the federal narcotics laws. A "series" in this context is established by proof of three or more violations. *See United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir. 1988). "Continuing," on the other hand, means that the three violations must somehow be related; it is well-established, for example, that clearly "isolated," and

accordingly unrelated, violations of the federal drug laws will not support a CCE conviction. *United States v. Jones*, 801 F.2d 304, 307 (8th Cir. 1986) (noting that three separate, unrelated, drug sales would not establish a continuing series); *see also United States v. Baker*, 905 F.2d 1100, 1104 (7th Cir.) (stating that "an unrelated conspiracy does not count [for CCE purposes] because it cannot be part of the 'continuing' series"), *cert. denied*, 498 U.S. 876, *and cert. denied*, 498 U.S. 904 (1990), *and cert. denied*, 498 U.S. 1030 (1991). Furthermore, the law is clear that the "continuing series" requirement is an element of the crime. *See, e.g., United States v. Grayson*, 795 F.2d 278, 283-84 (3d Cir. 1986) (stating that the government must prove that a felony violation of the narcotics law is "part of a continuing series of violations"), *cert. denied*, 479 U.S. 1054, *and cert. denied*, 481 U.S. 1018 (1987). As a result, to convict, a jury must agree unanimously that the defendant committed a continuing series of three drug-related criminal offenses. *See, e.g., In re Winship*, 397 U.S. 358, 364 (1970).

The district court in this case instructed the jury that "[a] continuing series of violations requires proof beyond a reasonable doubt that three or more violations occurred and that they, those three or more, were related to each other." Edmonds asked the district court to explain to the jury that it must unanimously agree *which three* of any narcotics violations they found to have occurred were related to each other for the purposes of the "continuing series" requirement. The district court declined to so instruct the jury, and Edmonds insists that this was reversible error.

The defendant in *Echeverri* also was charged with a CCE offense. He requested the following jury instruction:

> The second element the government must prove beyond a reasonable doubt is that this offense was part of a continuing series of violations of the federal narcotics laws. A continuing series of violations is three or more violations of the federal narcotics laws committed over a definite period of time. You must unanimously agree on which three acts constitute the continuing series of violations.

Echeverri, 854 F.2d at 642. We held that it was reversible error for the district court to decline to give this or a similar instruction. We explained:

> In the absence of a specific unanimity instruction directed to the government's several claims, it was apparent that the jury need not have unanimously agreed that any particular criminal act had been committed by the defendant.
>
> * * *
>
> Here, the jury was instructed that the continuing series element required them to find three violations of the drug laws . . . , yet as a result of the district court's refusal to give the requested instruction, there is no assurance that the jury unanimously agreed that the same narcotics violations occurred.

Id. at 642-43.

There is a difference between the facts of this case and those presented in *Echeverri*. The jury convicted Edmonds of each of the eight substantive counts involving the drug felonies alleged to constitute the continuing series. As a matter of logic, therefore, the jurors must have unanimously agreed that Edmonds committed every felony in the alleged "series." Thus, the government

maintains, the principles requiring a reversal in *Echeverri* do not require a reversal in this case.

This misunderstands Edmonds' argument. Edmonds does not dispute that the jury unanimously found he committed every one of the eight underlying narcotics violations. His argument instead is that the instruction given by the trial court did not require the jury to unanimously agree that the same three or more violations were "related" to each other for the purposes of the CCE statute. He thus contends that the mere fact that the jury returned a guilty verdict on the substantive counts involving the eight underlying offenses does not, by itself, establish that the jury found that the eight offenses, or any particular subset of three or more of the eight offenses, were related to each other.

It is possible, as Edmonds insists, that the jury, while finding that all eight violations occurred, did not actually agree on which violations were related to each other. For example, six jurors could have felt that violations A, B, and C (but no others) were related and the other six jurors could have concluded that D, E, and F (but no others) were related. Thus, as in *Echeverri*, it is possible that the jurors failed to unanimously agree that Edmonds was responsible for three related criminal acts and that the government therefore failed to meet its burden of proving a "continuing series" of violations.

B.

The government maintains that *United States v. Jackson*, 879 F.2d 85 (3d Cir. 1989), requires that we affirm Edmonds' CCE conviction. The defendant in *Jackson*, who

was also charged with a CCE offense, claimed that the jurors had to decide unanimously on the identities of his five underlings before they could conclude that the government had met its burden of showing that he acted in a "supervisory role." We agreed with the defendant that whether there were five or more underlings was in fact an essential element of the offense and that the jury accordingly had to reach a consensus on that fact. *Id.* at 88. We nevertheless rejected the notion that the jury must unanimously agree on the *identities* of the five underlings. *Id.*

The result in *Jackson* follows from the general rule that jurors need not be in "complete agreement as to the collateral or underlying facts which relate to the *manner* in which the culpable conduct was undertaken." *Id.* (emphasis added); *see generally Schad v. Arizona*, 501 U.S. 624, 631-37 (1991) (noting that the Constitution does not require jurors to "agree upon a single means of commission"); *Griffin v. United States*, 502 U.S. 46, 49-57 (1991). The elements of the crime proscribed by § 848, as viewed by the court in *Jackson*, are that (1) the defendant committed three drug felonies, and (2) each of those felonies were (a) related to each other, (b) undertaken in concert with five or more people whom the defendant organized or managed, and (c) produced substantial income or resources for the defendant. Satisfaction of element (2)(b) requires proof that a group of *a certain size* be involved in the commission of the felony. The identities of the people making up the group of underlings for the purposes of the CCE statute merely relate to the manner in which the culpable conduct is undertaken, however. Put simply, the CCE statute does not care who the five people are, it only

cares that the jurors agreed on the essential facts of "whether the requisite size and level of control existed." *Jackson*, 879 F.2d at 89; *see also United States v. Bafia*, 949 F.2d 1465, 1471 (7th Cir. 1991) (holding that it is not necessary that the same five people be involved when each of the criminal acts constituting the series is committed).

Under traditional principles of our criminal jurisprudence, the legislature, within constitutional limits not here implicated, can define a crime as it chooses. *Schad*, 501 U.S. at 632-37. Once the elements have been described, however, each must be proved to a unanimous jury beyond a reasonable doubt. *Echeverri*, 854 F.2d at 642-43. When a statute makes it a crime to engage in particular conduct on a single occasion and a jury unanimously agrees that a single event occurred involving conduct of the defendant and a state of mind that fit the statutory definition of the offense, we do not insist that the jury unanimously agree on the precise manner in which the offense was committed. The same analysis applies when the crime charged involves a series of events. When a jury unanimously agrees that a single set of events occurred involving actions of the defendant and a state of mind that fit the statutory definition of the offense, we do not insist that the jury unanimously agree on the manner in which the offense was committed. Thus, in *Jackson*, the jury unanimously agreed that a single set of events occurred and that individually and collectively those events fell within the statutory definition: the defendant participated in each event, each event was a violation of a controlled substance statute, each was related to two or more other such violations, each was

engaged in by the defendant through an organization of the requisite size, and each produced substantial gain for the defendant. This was sufficient. It was not necessary that the jury unanimously agree as to the identities of the five underlings in each instance.

Here we have quite a different situation. We do not know that the jury unanimously agreed that Edmonds participated in a single set of events that met all of the elements of the statutory definition. Because no event can meet the statutory criteria unless the distribution involved was related to two or more other distributions, the district court's charge leaves us without the requisite assurance that no juror had a reasonable doubt concerning Edmonds' guilt of the CCE charge. A juror may have had a reasonable doubt about the "relatedness" of one or more of the events that his or her colleagues thought constituted a series of three *related* drug offenses.

Thus, *Jackson* is inapposite here. To apply *Jackson* in this context would be to disregard as irrelevant the portions of the CCE statute requiring that the underlying criminal acts be of a particular character, i.e., that they be related. That is precisely the result we rejected in *Echeverri*. The required underlying criminal acts, including their "relatedness," are "facts necessary to constitute the crime" – not merely immaterial means – and therefore must be proven individually. *In re Winship*, 397 U.S. 358, 364 (1970). Consistent with *Jackson*, the jury need not agree on *how* the three violation events were related, but they must agree that the defendant participated in three specific events and that those events were related. Not requiring unanimity on which three or more criminal acts are related leaves open the possibility that Edmonds

could have been convicted without unanimous juror agreement that he engaged in a "continuing series" of criminal acts, that is, without unanimous agreement that he committed the crime charged.

We are aware that the U.S. Court of Appeals for the Seventh Circuit has declined to follow our decision in *Echeverri. United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1701, *and cert. denied*, 112 S. Ct. 1940, *and cert. denied*, 112 S. Ct. 1954 (1992). The court there argued that the result in *Echeverri* "is at odds with the purpose of the [CCE statute] which is interested in punishing a defendant whom the jury is convinced was involved in a related series of drug activity with relevant frequency. It is the defendant's demonstrated frequency in participating in conspiratorial drug offenses that is the focus of the [CCE] offense, rather than any particularization of the acts used to demonstrate 'continuous.' " *Id.* at 948 n.7.

We respectfully disagree with the Seventh Circuit's analysis. Implicit in its approach is the view that the predicate offenses making up a "continuous series" of violations and their "relatedness," like the identities of the underlings, are immaterial "means" and not material elements of the crime requiring specific juror agreement. The court reasoned, for example, that "the exact specification by unanimous jury consent of any particular three of a greater number of offenses is irrelevant to any theory about why punishment should be enhanced for such uniquely antisocial activity." *Id.* at 948. We believe Congress drafted the CCE statute as it did because it regarded the existence of a series of related offenses as

material to whether the substantially enhanced punishment there provided is appropriate. Moreover, in the absence of evidence that Congress intended to depart from the traditional approach of our criminal jurisprudence, we decline to attribute to it an intent that this enhanced punishment be visited on a defendant where the jury is unable to agree beyond a reasonable doubt that the defendant participated in three specific events constituting such a series.

The relevant point is not, as the Seventh Circuit views it, whether a person who commits three related drug violations with the requisite sized group on May 12th, 13th, and 14th of a given year is as culpable as if he or she commits similar violations with the requisite sized group on June 12th, 13th, and 14th. The relevant point is that a person cannot be held criminally responsible if half of the jury believes the defendant committed the conduct described by the statute on May 12th, 13th, and 14th, but not in June, and the other half believes the defendant committed the conduct described by the statute on June 12th, 13th, and 14th, but not in May. *Cf. Schad*, 501 U.S. at 651 (Scalia, J., concurring) (stating that "moral equivalence" would not justify upholding an assault conviction where a portion of the jury may have believed the defendant assaulted X on Tuesday, while the other half may have believed the defendant assaulted Y on Wednesday).

This case is governed by *Echeverri* and its forbearers,[2] not *Jackson*. We are confronted here with a situation in which the trial court correctly charged that a "continuing

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[2] *E.g., United States v. Beros*, 833 F.2d 455 (3d Cir. 1987).

series," that is, "three or more violations . . . related to each other," was an element of the offense and that the jury must unanimously agree on each element of the offense. However, the trial court failed to further explain what unanimity meant in this context. Although this may not have been plain error had Edmonds not requested a more specific explanation, he did so request.[3]

C.

That the trial court erred in not giving the appropriate unanimity instruction does not end our inquiry, however. We still must determine whether we could affirm Edmonds' CCE conviction on the ground that the failure to give the proper instruction was harmless error. Given the evidence in this case, it is difficult to believe that a rational jury who was convinced beyond a reasonable doubt that Edmonds committed all eight of the violations alleged to constitute the "continuing series," would then have failed to conclude that each and every one of those acts were related. The evidence that the jury must have credited to convict Edmonds of the eight crimes alleged

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[3] In *United States v. Anderson*, 859 F.2d 1171 (3d Cir. 1988), we held that the failure to give a further explanation in a similar situation in the absence of a request was not plain error. The appellant did not make the same argument made here about the requirement of relatedness. Rather, he complained about the failure to instruct specifically that *three* criminal acts were required and that the jury had to unanimously agree on which three criminal acts occurred. We found that the district court erred but that its error did not result in plain error because the jury unanimously found the appellant guilty of three counts of distribution and one count of conspiracy. *Id.* at 1175.

to constitute the series established that there was a single, on-going scheme and that Edmonds used the same packers and method of distribution throughout the relevant period. Nevertheless, we conclude that the Supreme Court's decision in *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), precludes us from engaging in a harmless error analysis.

Sullivan concerned the propriety of appellate courts engaging in harmless error analysis where the jury instructions gave an unconstitutional definition of reasonable doubt.[4] The Court ruled that permitting harmless error analysis in that situation would violate the defendant's Sixth Amendment right to a jury trial. It explained:

> Since [the jury never found the defendant guilty beyond a reasonable doubt,] there has been no jury verdict within the meaning of the Sixth Amendment [and] the entire premise of *Chapman* [*v. California*, 386 U.S. 18 (1967),] review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the *same* verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent

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[4] The trial judge in *Sullivan* gave a definition of reasonable doubt essentially identical to the definition the Supreme Court had held unconstitutional in *Cage v. Louisiana*, 498 U.S. 39 (1990) (per curiam). The charge held unconstitutional in *Cage* explained that reasonable doubt "must be such doubt as would give rise to grave uncertainty. . . . It is an actual substantial doubt. . . . What is required is not an absolute or mathematical certainty, but a moral certainty." *Id.* at 40. The Court in *Cage* ruled that given this instruction "a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41.

> the constitutional error is utterly meaningless. There is no *object* so to speak, upon which harmless error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt – not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. . . . The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty.

Sullivan, 113 S. Ct. at 2082.

The relatedness requirement is an element of the CCE offense. Accordingly, the government was required to prove, and the jury was required to unanimously find, relatedness beyond a reasonable doubt. *See Sullivan*, 113 S. Ct. at 2080. The jury instruction in this case therefore permitted the jury to return a nonunanimous verdict on an element of the offense. Thus, as in *Sullivan*, there has been no actual jury finding of guilty on the CCE charge against Edmonds. Under *Sullivan*, we cannot rule that the error was harmless.[5] It follows that Edmonds' CCE conviction must be reversed.

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[5] *Rose v. Clark*, 478 U.S. 570, 580 (1986), does not require a different result. There, the Court held that a jury-instruction error erecting a presumption regarding an element of the offense (malice), while violating Fourteenth Amendment, nevertheless was harmless error. Although the jury there was instructed to presume malice from certain predicate facts, it still was required to find the existence of those facts beyond a reasonable doubt. The Court concluded that a finding of the underlying facts there was "functionally equivalent" to finding the presumed element of malice. Here, on the other hand, the

III.

Carlton Love and Cora Love maintain that the trial court improperly attributed to them for sentencing purposes a larger quantity of narcotics than was justified by the trial evidence. When reviewing a district court's sentencing decisions, a court of appeals has plenary review over legal questions about the meaning of the Sentencing Guidelines. *United States v. Fuentes*, 954 F.2d 151, 152-53 (3d Cir.), *cert. denied*, 112 S.Ct. 2950 (1992). The factual determinations underlying the application of the Guidelines are reviewed under the clearly erroneous standard. *Id.* When a district court employs an appropriate legal standard, we will not disturb its determination of the amount of drugs attributable to a particular defendant unless that determination is clearly erroneous. *United States v. Nagi*, 947 F.2d 211, 215 (6th Cir.1991), *cert. denied*, 112 S.Ct. 2309, *and cert. denied*, 112 S.Ct. 2309 (1992).

A.

The district court determined that Carlton Love was involved in a conspiracy to distribute at least 500 kilograms of cocaine and 3 kilograms of heroin. The government originally attributed nine different shipments or requests for shipments of cocaine to Carlton

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government asks us to assume relatedness from the mere fact that Edmonds was found guilty on each of the underlying violations. This would require us to engage in pure speculation – to impose our "view of what a reasonable jury would have done." *Sullivan*, 113 S.Ct. at 2082. To do so would impermissibly permit the "wrong entity [to] judge the defendant guilty." *Rose*, 478 U.S. at 578. That, we cannot do.

Love. The government now has admitted that it has insufficient evidence to attribute to Carlton Love the final 100 kgs shipment of cocaine. Our calculations reveal that this fact alone will reduce his offense level to 40. Accordingly, we will remand his case for resentencing.[6]

B.

The district court attributed four separate shipments of cocaine to Cora Love.[7] Each shipment originated in the

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[6] Based on a cocaine attribution of over 500 kgs and a heroin attribution of 3 kgs, the district court determined Carlton to have a base offense level of 40 in accordance with the drug quantity table contained in USSG § 2D1.1(c)(2). At a criminal history category of I, and with a two-level increase for possession of a firearm in connection with drug-trafficking activities, Carlton's sentencing range was 360 months to life. The district court sentenced Carlton to 360 months. If less than 500 kgs of cocaine are attributed to Carlton, he falls under § 2D1.1(c)(3), which reduces his base offense level from 40 to 38, and, with the two-level increase for possession of a firearm, yields a sentence of 292 to 365 months.

[7] Cora Love denies that any of these four shipments should be attributed to her, claiming that she was an unwitting courier. The record contains ample evidence supporting the district court's conclusion that she knew exactly what she was doing, however. She drove a car on four occasions to pick up sealed suitcases of cocaine upon their arrival in Detroit. She also handed Russell Freeman, Sr. money for the drugs. In addition, she brought Ekwensi a package of Bounce Fabric Softener sheets from the store Cora Love managed so that Ekwensi could package drug money for transport. (Bounce apparently makes the presence of drug residue on the money more difficult to detect.) Further, Cora Love at one point told Ekwensi, as the two were about to meet Freeman, Sr., not "to look too obvious" and to "just look casual about it." (App. at 754.) We accordingly

Philadelphia area and was transported to Detroit in rental cars driven by Russell Freeman, Sr. Cora Love was among those who met Freeman, Sr. at a Detroit hotel at the end of each of these four trips. She also was the person who each time paid Freeman, Sr. a courier fee. The government argues that the record supports a finding that the first shipment weighed 25 kgs and that the second through fourth shipments weighed 50 kgs each. Accordingly, it attributes a total of 175 kgs of cocaine to Cora Love for sentencing purposes. Our review of the record has disclosed the following evidence with respect to each of the four shipments.

Russell Freeman, Jr. testified that his father made four trips to Chicago in late 1991 and 1992 and that on each occasion his father transported between 35 kgs and 50 kgs of cocaine.

The first shipment – Russell Freeman, Sr. testified that he first transported cocaine to Detroit in December 1991. That first shipment consisted of two suitcases. Ekwensi testified that she met Freeman, Sr. upon his arrival in Detroit and that she carried the lighter of the two suitcases to the car driven by Cora Love. Ekwensi further testified that "there was about 12 keys in one of the pilot cases" (the one she carried) and that "[Freeman, Sr.] carried the heavy one." (Supp. App. III at 55a.) The district court attributed 25 kgs of cocaine to Cora Love for this first shipment, and Cora Love does not contest this attribution.

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conclude that the trial court's ruling that Cora Love was involved in these four shipments was not clearly erroneous.

The second shipment – The second shipment also occurred in December 1991, "just before Christmas." Freeman, Sr. testified that he again delivered two suitcases, although he did not state how much each suitcase weighed. The government contends that this evidence, coupled with Freeman, Jr.'s statement that each of his father's deliveries weighed between 35 kgs and 50 kgs, supports the district court's finding that the shipment contained 50 kgs of cocaine.

The third shipment – Freeman, Sr. delivered the third shipment to Detroit in January 1992. Ekwensi estimated that the shipment weighed "[a]nywhere from 40 to 50 keys, leaning more toward 50 keys." From this, the government concluded that Cora Love should be attributed an additional 50 kgs. The district court agreed.

The fourth shipment – The court found that the final shipment attributable to Cora Love also weighed 50 kgs. The most precise evidence regarding this shipment came from Ekwensi, who indeed testified at first that the shipment weighed 50 kgs. She then stated that she lowered the price she charged Carlton Love for the drugs after he pointed out that each "kilogram" was missing four ounces. One ounce weighs 28.349 grams. Accordingly, if one takes into account the reduction, the shipment weighed roughly 5.5 kgs less than the 50 kgs that the court attributed to Cora Love on the fourth shipment.

The district court thus attributed 175 kgs to Cora Love. Any attribution of more than 150 kgs results in an offense level of 38, the offense level utilized in determining Cora Love's sentence. We believe there is evidence from which a fact finder, with appropriate findings and

explanations, could properly attribute to Cora Love either more or less than 150 kgs. We cannot, however, sustain the district court's allocation based on the current record.

Attributing quantities of drugs for sentencing purposes is an oft-recurring task for district judges. The magnitude of the consequences that can flow under the Sentencing Guidelines from one attribution rather than another make this a very important undertaking. It can also be a very difficult one, in part because precise drug-weight information is frequently not available. Because the available relevant information is often imprecise, the Guidelines recognize that the sentencing scheme they contemplate cannot work unless judges are authorized to estimate the quantity of drugs possessed or distributed on a particular occasion. *See, e.g.*, USSG. § 2D1.1 application note 12 ("where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance"). We have cautioned, however, that the necessity of estimating drug weights for sentencing purposes "is not a license to calculate drug amounts by guesswork." *United States v. Paulino*, 996 F.2d 1541, 1545 (3d Cir.), *cert. denied*, 114 S.Ct. 449, *and cert. denied*, 114 S.Ct. 618 (1993).

The government has the burden of providing a rational basis for an assessment of drug weight and a sentencing court has the responsibility of identifying a rational basis for the attribution it ultimately makes, assuming that basis is not otherwise obvious from the record. In the absence of such evidentiary support and an appropriate explanation, the Guidelines sentencing process can exact grave sanctions on a wholly arbitrary basis. While a

sentencing judge cannot insist on being satisfied that a particular weight is more likely than not the historically correct weight, he or she can insist that the government provide information from which the court can conclude that more likely than not the historically correct weight equaled or exceeded the weight attributed. *See Paulino*, 996 F.2d at 1545 (stating that "the sentencing court must carefully scrutinize the government's proof to ensure that its estimates are supported by a preponderance of the evidence"); *see also United States v. Collado*, 975 F.2d 985, 998 (3d Cir.1992) (same).

When a law enforcement officer or lay person familiar with a drug indicates that he or she has observed or handled a quantity of drugs and estimates that it weighed five kilograms, there is a rational basis for the court to estimate the weight at five kilograms. When such a person estimates the weight to be between four and six kilograms and it is apparent that he or she is simply taking into account that he or she is making an approximation, there is a similar rational basis for the court to estimate the weight at five kilograms. But where a knowledgeable person provides a range of weights, this alone does not provide a rational basis for attributing to the defendant the highest weight in that range.

Thus, in this case, we do not believe that Ekwensi's testimony that the cocaine in the third shipment weighed "[a]nywhere from 40 to 50 keys" provides a rational basis for attributing 50 kilograms to Cora Love even though Ekwensi added the modification "leaning more towards 50 keys." Nor do we believe that Freeman, Jr.'s testimony, without more, can supply a rational basis for concluding that the weight of the cocaine on the second trip was 50

kgs. As with Ekwensi's testimony about the third shipment, a sentencing judge may not arbitrarily select the highest figure in an estimated range of weights.

Moreover, we believe Freeman, Jr.'s testimony would not warrant a judge in assigning the average of 35 kgs and 50 kgs, or 42.5 kgs to each of the four shipments. It seems apparent from its context that Freeman, Jr.'s 35 kgs to 50 kgs statement was not intended either as an estimate of a constant amount of drugs transported on each of the four occasions or as an estimate of the average weight of the shipments. Rather, he appears to be saying that the smallest shipment was 35 kgs, the largest was 50 kgs, and the other two shipments were no smaller or larger. If the district court concludes that this is the import of Freeman, Jr.'s testimony, that testimony would not justify an approach which would merely strike an average between 35 kgs and 50 kgs.

There is evidence, we believe, from which a trier of fact could conclude that Freeman, Jr. packed his father's car with cocaine before the start of each trip and that he was keeping track of the quantity of drugs being delivered in each instance. If the district court concludes that this was the case and that the import of his testimony was as we have hypothesized, we believe Freeman, Jr.'s testimony would provide a rational basis for a finding that the total weight of the four shipments was at least 155 kgs (i.e., one shipment of 35 kgs, one of 50 kgs and two of at least 35 kgs).

Turning to the evidence concerning the fourth shipment, we conclude that Ekwensi's testimony cannot, without further explanation, support a finding that 50 kgs

were transported on this occasion. Without the benefit of an explanation from the district court, we can think of no rational basis on which a trier of fact could accept her initial testimony that the weight was 50 kgs without also crediting her acknowledgement that she was forced to drop the price because each kilogram was missing four ounces.

As the court observed in *United States v. Sepulveda*, 15 F.3d 1161, 1199 (1st Cir.1993), *cert. denied*, 114 S.Ct. 2714 (1994), a "sentencing court remains free to make judicious use of properly constructed averages." But this does not relieve the government of its burden of providing the court with sufficient information to permit a conclusion that the average more likely than not is equal or less than the historically accurate weight of the drugs attributable to the defendant. While we believe it may be possible to conclude from this record that, more likely than not, the four shipments totalled in excess of 150 kilograms, that conclusion would have to be based on factual findings that the district court has yet to make. Accordingly, we will remand Cora Love's case to the district court for more fact finding and possible resentencing.

IV.

On August 12, 1992, FBI agents attempted to arrest Carlton Love at his residence in an apartment complex on Riverside Drive in Southfield, Michigan, pursuant to an arrest warrant. The warrant application was supported by an affidavit that summarized the results of the FBI's

six months of investigation. That affidavit provided information about thirty-one Federal Express shipments containing illegal drugs sent to addresses associated with the nationwide cocaine- and heroin-distribution operation and referred to telephone conversations which had been intercepted in which Carlton Love and Ekwensi discussed drug and money transactions. Included with the excerpts of the conversations between the co-conspirators were the agent's suggested interpretations of the dialogue, based upon his experience and expertise in drug trafficking investigations. Based upon the information in the affidavit, the magistrate properly concluded that there was a fair probability Carlton Love was engaged in illegal drug trafficking.

When the FBI agents entered Carlton Love's apartment with the warrant for his arrest, they did not find him there. They did, however, find drug paraphernalia in plain view. This evidence was seized after the agents secured a search warrant based on the information contained in the arrest warrant affidavit and what they had learned during their visit to Carlton Love's apartment.

Love acknowledges that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is a reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980). He insists, however, that the agents had no reasonable grounds for believing that he was at home when they entered his apartment with the arrest warrant. He maintains that, as a result, the search warrant was invalid and the items seized under its authority should have been suppressed. The district court concluded that the agents had reason to

believe Carlton Love was in his apartment on the morning of August 12th, and we agree.

The agents' investigation disclosed that Carlton Love signed the lease and paid the rent for apartment 1725 at 23600 Riverside Drive. The gas service account was in his name and the telephone was listed in the name of his mother. On August 11th, a management representative of the apartment complex, during a visit from the agents, confirmed that Carlton Love lived in the apartment and that he used the black Ford Mustang then parked immediately in front of the apartment.

The agents asked the management representative to call if Carlton Love was seen in the complex. Later that day, the agents were called and advised that he had been observed exiting his apartment and departing the area. Thus, as of the evening of August 11th, the agents had current information indicating that Carlton Love was then living in the apartment.

The agents came to the apartment to arrest Carlton Love at 6:45 a.m., early enough that it was unlikely someone living in the apartment would have already departed for the day. On their arrival, they observed the black Mustang parked in front of the apartment. They maintained surveillance as other residents of the complex departed for their daily activities. By 9:30 a.m. all of the vehicles near the apartment except the black Mustang were gone. No one had left the Love apartment. At approximately 9:40 a.m., the agents entered the exterior door and proceeded to the interior door of apartment 1725. Simultaneously, they called the telephone number of the apartment, knocked on the door, and announced

their presence. There was no response. The agents "thought that there was a good possibility that [Love] was in there hiding."

The agents then called an Assistant United States Attorney to secure his opinion as to whether they had probable cause to enter the apartment to search for Carlton Love. After receiving an affirmative response, they again called, knocked, and announced themselves at the interior door to the apartment. Receiving no response, they entered using a key provided by the management.

Once inside and not finding anyone in the living room, they proceeded to the master bedroom and closet where they thought Carlton Love might be hiding. On the floor of the closet was a large cardboard box containing "plastic baggy material" and a vinyl case similar to cases they had previously seen used to carry three beam scales. They left the apartment and sought a search warrant. Carlton Love was arrested the following day while boarding an airplane.

Carlton Love stresses that the last sighting of him prior to the entry of the agents had been of him leaving the apartment. In his view, from this fact and the fact that the agents received no response to their simultaneous call and knock, the agents undoubtedly realized, or should have realized, that he was not in the apartment on the morning of August 12th. In our view, while the information available to the agents clearly did not exclude the possibility that Carlton Love was not in the apartment, the agents had reasonable grounds for concluding that he was there. Normally, a person who is currently living at an apartment returns there at some point to spend the

night and does not leave prior to 6:45 a.m. The presence of the black Mustang immediately in front of the Love apartment tended to confirm what one would normally expect and this expectation was not dispelled by the fact that someone probably involved in a drug operation did not appear when the agents announced themselves at his door.

V.

We have considered the remaining issues raised by the appellants and have concluded that they do not warrant a reversal of their convictions or a change in their sentences.[8]

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[8] Those remaining issues, as articulated by the appellants, are: First, all the appellants maintain that the trial court erred in admitting wiretap evidence at trial, alleging that both the affidavits in support of the wiretaps and the orders authorizing the wiretaps did not meet the requirements of 18 U.S.C. § 2518. Second, all appellants maintain that they were denied a fair trial because the trial judge persistently interfered with and placed improper limitations on defense counsels' efforts to mount a defense. Third, all appellants except for Cora Love claim that the trial court erred when it instructed the jury that the appropriate measure of forfeiture was the "gross proceeds" received by the various defendants. Fourth, Carlton Love argues that the trial court for sentencing purposes incorrectly concluded that he possessed a firearm in connection with drug-trafficking activities. Fifth, Duncan appeals his sentencing, arguing (1) that the district court incorrectly attributed a larger portion of the narcotics to him than was justified and (2) that the court used the wrong standard when it rejected his claim that he played a minor role in the conspiracy which resulted in accomplice attribution. Finally, Duncan argues that the district court committed plain error when it admitted his co-conspirators' guilty pleas on the issue of credibility.

VI.

For the foregoing reasons, we will reverse the judgment of the district court against Theodore Edmonds on the charge of managing, supervising, and organizing a continuing criminal enterprise, in violation of 21 U.S.C. § 848. The district court's sentences of Cora Love and Carlton Love will be vacated and their cases will be remanded for further sentencing proceedings consistent with this opinion. We will affirm the judgments of the district court in all other respects.[9]

HUTCHINSON, Circuit Judge, *Concurring.*

I concur with the result the Court reaches in these cases and with much of the reasoning in Judge Stapleton's fine opinion. Specifically, I agree with the Court that *United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir.1988), requires us to vacate Theodore Edmonds' conviction of managing, supervising and organizing a continuing criminal enterprise ("CCE") in violation of 21 U.S.C.A. § 848 (West 1981 & Supp. 1994). *See* Opinion of the Court, Part II, at 7-20; IOP 9.1. I write separately, however, to note that if this particular issue were a matter of first impression, I would be inclined to follow the reasoning of the Seventh Circuit in *United States v. Canino*, 949 F.2d 928, 947-48 (7th Cir.1991), *cert. denied*, 112 S.Ct. 1701, *and cert. denied*, 112 S.Ct. 1940, *and cert. denied*, 112 S.Ct. 1954 (1992).

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[9] After oral argument in this case Cora Love and Carlton Love filed a motion to add an additional issue on appeal. Their motion did not state adequate grounds explaining why they failed to raise these issues earlier, however. Accordingly, their motion will be denied.

Echeverri precludes me from following that course. Nevertheless, I believe *Echeverri* can lead to results that are inconsistent with the purpose of the CCE statute and does so in this case where the jury convicted Edmonds of all the substantive counts involved in all of the predicate felonies. I recognize that the district court could have easily avoided the unanimity problem if it had not refused to give the jury instruction the defense requested on the need for unanimity in all respects material to a CCE case, including specifically those offenses that the jury believed were "related." Nevertheless, the Court concedes: "As a matter of logic, . . . the jurors must have unanimously agreed [in this case] that Edmonds committed every felony in the alleged 'series,' " but then goes on to conclude this does not establish unanimity on relatedness. Opinion of the Court, Part II, at 9. I agree with the Court this latter conclusion is a corollary of *Echeverri*. *See id.* at 6-16.

I am *dubitante* on the Court's conclusion that harmless error analysis is foreclosed by *Sullivan v. Louisiana*, 113 S.Ct. 2078 (1993). *See* Opinion of the Court, Part II, at 14-16. Regardless, I believe the tension, which the Court recognizes, between *Echeverri* and *United States v. Jackson*, 879 F.2d 85 (3d Cir.1989) warrants reconsideration of this unanimity requirement as it relates to a continuing criminal enterprise. Therefore, because *Echeverri* is a controlling precedent, I concur in the Court's disposition of Edmonds' appeal.

In all other respects, I am in full agreement with the reasoning in the Court's opinion.

GARTH, Circuit Judge, *Concurring in Part and Dissenting in Part:*

I concur in all but one of the conclusions reached by the majority. And while I share Judge Hutchinson's concerns regarding the *Echeverri* doctrine, and believe that the conceptual tension between *Echeverri* and *Jackson* calls for further resolution, I agree that *Echeverri* and our Internal Operating Procedure 9.1, which precludes us from overturning an earlier panel's position, constrain our disposition of the present matter. I therefore agree that Edmonds' conviction must be reversed.

The only aspect of the majority opinion with which I differ concerns the decision to vacate Cora Love's sentence and remand her case for resentencing by the district court. I agree that arbitrariness in drug-quantity attributions cannot be tolerated. I am also in full accord with the guidelines and principles ably set forth by the majority to achieve the objective of determining a rational basis on which to predicate a defendant's sentence. *See* Opinion of the Court, Part III.B.

However, as I read the record, any appropriate calculation of the amount of cocaine attributable to Cora Love *must* exceed the threshold of 150 kgs specified in U.S.S.G. § 2D1.1(c)(3).[1] I believe that the record provides ample support for the very "rational basis" which the majority

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[1] Section 2D1.1(c)(3) of the 1992 United States Sentencing Guidelines provides for a base offense level of 38 for "[a]t least 150 KG but less than 500 KG of Cocaine. . . . " With a Criminal History Category of 0 and a two-level reduction for minor participation, Cora Love was subject to a sentence of 188-235 months. The district court sentenced Cora Love to 188 months.

requires in order to uphold Cora Love's sentence. Indeed, I find that it cannot otherwise be read. I thus believe it unnecessary to remand and require the district court to reconsider Cora Love's sentence. For this reason, I respectfully dissent.

As is detailed by the majority, the record reflects four shipments attributable to Cora Love as follows:

Shipment Number	Supporting Testimony (kgs per shipment)	Quantity – giving the benefit of the record to Cora Love
One	Freeman, Jr.: 35-50. Ekwensi: 25.	25 kgs
Two	Freeman, Jr.: 35-50.	42.5 kgs
Three	Freeman, Jr.: 35-50. Ekwensi: "40 to 50, leaning towards 50."	45 kgs
Four	Freeman, Jr.: 35-50. Ekwensi: 50 – but each kg was also "short" four ounces, for a total of 44.5 kgs.	44.5 kgs
		Total: 157 kgs

On my reading of the record, based on Ekwensi's testimony, which in this instance is not contested by Cora Love, I would attribute no more than 25 kgs for the first shipment.

As to the second shipment, I read Freeman, Jr.'s testimony that "[e]ach trip my father took it was somewhere between 35 and 50 kilos of cocaine" (Supp. App. III

p. 75a) to yield the rational inference, not that there were four deliveries ranging in size from 35 to 50 kgs as the majority suggests, *see* Maj. Op. at 20-22, but that each of the four shipments weighed between 35 and 50 kgs, a fact which, on the majority's own analysis, would result in an average of 42.5 kgs for each shipment.

Courts have sanctioned the use of averages to compute drug weights in other cases. *See, e.g., United States v. McMillen*, 8 F.3d 1246, 1250-51 (7th Cir.1993); *see generally* Federal Judicial Center, *Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues* 21-32 (1994). And the majority here so acknowledges. Maj. Op. at 21. In this case, Freeman, Jr. has testified that each shipment weighed between 35 and 50 kgs, thereby establishing an average of 42.5 kgs for the second shipment, as to which no other testimony was given.

Freeman, Sr. delivered the third shipment sometime in January of 1992. Ekwensi estimated that the shipment weighed "[a]nywhere from 40 to 50 keys, leaning more toward 50 keys." Under the majority's own analysis, every reason exists to attribute to Cora Love at the least, 45 kgs.

As to the fourth shipment, I am in accord with the majority's reasoning and the majority's attribution of 44.5 kgs to Cora Love. Maj. Op. at 18-19.

The four shipments, therefore, total 157 kgs, and this total is reached without taking into account an additional 28 kgs referred to in Count V of the Indictment. Cora Love was convicted on this Count, and the government points out that this amount should have been included in Cora Love's attributed total, but for some reason was not.

See Government's Letter Memorandum dated October 25, 1994, p. 3. If one adds this 28 kgs to the 157 kgs noted above, a total of 185 kgs results. But even if the 28 kgs are not added to the weight of the first four shipments, the total still exceeds the 150 kg threshold of § 2D1.1(c)(3).

The above calculations, which comport with each and every principle and guideline laid down by the majority, can only lead to one conclusion – that the record, as it presently exists, yields a rational basis for attributing over 150 kgs of cocaine to Cora Love. The drug weights attributed to Cora Love, giving her every benefit of the record, necessarily exceed 150 kgs. This being so, I cannot bring myself to vote for a remand to an overworked and overburdened district court so that the court may engage in the meaningless task of resentencing Cora Love. This procedure might well entail the taking of additional evidence and would, at the very least, require additional findings drawn from a record which, I believe, just cannot be read to reveal less than 150 kgs.

I therefore dissent from so much of the majority's judgment as would vacate Cora Love's sentence and remand her case to the district court for what I regard as a needless exercise in sentencing endeavors.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Filed June 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1890

UNITED STATES OF AMERICA

v.

THEODORE EDMONDS,

Appellant

Present: SLOVITER, *Chief Judge*, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, and GARTH*, *Circuit Judges*.

ORDER

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court vacate the panel's opinion and judgment entered April 18, 1995 insofar as it relates to No. 93-1890 and list the above case for rehearing in banc at the convenience of the court.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: June 29, 1995

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* as to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1890

UNITED STATES OF AMERICA

v.

THEODORE EDMONDS,

Appellant

On Appeal From the United States District Court For
the Eastern District of Pennsylvania
(D.C. Criminal No. 92-cr-00504-1)

Argued: October 24, 1994

Before: STAPLETON, HUTCHINSON, and GARTH,
Circuit Judges.

(Opinion Filed: April 18, 1995;
vacated June 29, 1995)

Reargued *In Banc*: October 25, 1995

Before: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS,
McKEE, SAROKIN, and GARTH
Circuit Judges.

(Filed: April 4, 1996)

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ORDER AMENDING OPINION

It is hereby ORDERED that the opinion in this case filed on April 4, 1996 is amended as follows at the end of footnote 22:

Judge Roth joins in Part III of this opinion.

BY THE COURT:

/s/ Illegible
Circuit Judge

DATED: APR 16 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 93-1890

UNITED STATES OF AMERICA

v.

THEODORE EDMONDS,

Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Criminal No. 92-cr-00504-1)

Present: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, and GARTH *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 24, 1994. The opinion of a panel of the Court was vacated by order granting rehearing in banc entered June 29, 1995. The cause was reargued before the Court in banc October 25, 1995

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered September 14, 1993, be, and the

same is hereby affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Illegible
Clerk

Dated: April 4, 1996